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In the
Supreme Court of the United States

OCTOBER TERM 1984

HUBERT T. CRABTREE

Petitioner

VERSUS

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In pertinent part, 18 U.S.C. §3143 states that a defendant shall be detained pending appeal of a conviction unless the court finds "that the appeal is not for the purpose of delay and raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2). The issue presented is whether the district court properly interpreted this requirement.

ISSUES PRESENTED

A

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143 (B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

B.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

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PETITION FOR WRIT OF CERTIORARI

The above-named petitioner, Hubert T. Crabtree, pursuant to the provisions of Section 1254(1), Title 28, United States Code, and Rule 20.1 of the United States Supreme Court, herein applies for a Writ of Certiorari to review a decision of the United States Court of Appeal for the Fifth Circuit, rendered on February 22, 1985. (See Exhibit A.) That decision denied petitioner's bail pending the appeal of a judgment of conviction rendered on December 21, 1984. (See Exhibit B.)

I.
Order and Opinion Below

On February 22, 1985, the United States Court of Appeal for the Fifth Circuit, in an opinion written by Charles Clark, Chief Judge, upheld a decision of the district court judge, the Honorable Peter Beer, which denied petitioner's request for bail pending the appeal of his conviction in the instant case. The sole issue presented to the Fifth Circuit was whether or not the district court had correctly applied 18 U.S.C. §3143(b)(2) (hereinafter the Bail Reform Act of 1984). That section of the Bail Reform Act changes the standards to be applied to post-conviction bail from those of a "merely frivolous" appeal to one which places a burden on the defendant to show that the appeal "raises a substantial question of law or fact likely to result in reversal or a new trial."

II.
Statement of Facts

The facts necessary to an understanding of the issues

presented by this Application are as follows: On December 21, 1984, petitioner, Hubert T. Crabtree, was convicted in Case Number 84-103 "M" of the United States District Court for the Eastern District of Louisiana on two counts of "racketeering" under Sections 1962(c) and (d) of Title 18, United States Code. The predicate acts alleged in the indictment, insofar as Mr. Crabtree is concerned, occurred on December 31, 1979 and June 26, 1980. On January 23, 1985, petitioner was sentenced to a prision term of three years and four months on each count and assigned a surrender date of February 6, 1985, although the U.S. Attorney moved for his immediate detention. The U.S. Attorney had made a similar motion on December 21, 1984, when the verdict was returned. On the date of the sentencing, January 23, 1985, petitioner Crabtree filed with the district court a Motion to Remain on Bond Pending Appeal.

This litigation was begun on March 20, 1984, pursuant to an indictment filed in the Eastern District of Louisiana. At that time, petitioner Crabtree was released pursuant to posting a One Hundred Thousand Dollar property bond. He remained on bond during the entire course of the litigation. On December 21, when the jury returned its verdict and the U.S. Attorney moved for immediate incarceration, the district court judge increased petitioner Crabtree's bond to the sum of Two Hundred Fifty Thousand Dollars. This bond was posted and petitioner remained free throughout the sentencing phase and was allowed to surrender to the Federal Correctional Center at LaTuna, New Mexico on February 6, 1985.

On January 25, 1985, the district court denied petitioner Crabtree's Motion to Remain on Bond Pending Ap-

peal. The district court's opinion is set forth in full as Exhibit C. The district court judge based his opinion upon an interpretation of his duties under the Bail Reform Act of 1984 and stated that he was solely concerned with that section of the Act which concerned the gravity and gravamen of the appeal. He stated that he did not feel that the defendants presented a threat to society and that he was not concerned with the likelihood of their fleeing the jurisdiction. (Exhibit D, pp. 39,49,52).

On January 31, 1985, petitioner appealed the district court's decision to the United States Court of Appeal for the Fifth Circuit (Exhibit E), and on February 22, 1985, the Fifth Circuit Court of Appeal, pursuant to a decision written by Charles Clark, Chief Judge, upheld the district court's decision principally because it could not review the district court's opinion regarding the bail without a full transcript of petitioner's trial. (Exhibit A, p.3)

III.
Statement of Issues Presented

In pertinent part, 18 U.S.C.§3143 states that a defendant shall be detained pending appeal of a conviction unless the court finds "that the appeal is not for the purpose of delay and raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143(b)(2). The issue presented is whether the district court properly interpreted this requirement.

IV.
Statement of Relief Sought

Petitioner seeks an Order of the Honorable Court reversing the district court's denial of his Motion to Remain on Bond Pending Appeal, and releasing him on bond pending the appeal of his conviction by properly interpreting Section 3143(b)(2) of Title 18 of the United States Code. Alternatively, petitioner seeks the remand of the issue back to the trial court for a decision on petitioner's Motion to Remain on Bond Pending Appeal in light of the proper interpretation of that law. Petitioner also requests a writ issue ordering his release pending the outcome of this writ.

V.
Reasons Why Writ Should Issue

On January 23, 1985, the date of petitioner's sentencing and the filing of his Motion to Remain on Bond Pending Appeal, the district court judge stated that he was solely concerned with the provisions of Section 3143(b)(2), the Bail Reform Act of 1984, which changes the standard for remaining free on bond during the pendency of an appeal from a determination by the trial court that the appeal was "merely frivolous" (18 U.S.C. §3148) to one which places a substantial burden on the defendant to show that the appeal raises a substantial question or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143 (b)(2). (Exhibit D, p.52). The district court's opinion at Exhibit C addresses that section of the law, making it clear that its decision to deny petitioner bail pending appeal rested solely on its interpretation of that section. In sum, the district

court states that it "did agree in all respects with their (the jury's) verdict as to each count involving each defendant . . ." and then stated:

> "I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal. Nor were there any substantial questions of law or fact which will result in an order for a new trial." (Exhibit C, p.2).

On the basis of this observation, the district court denied petitioner's Motion for Bail Pending Appeal. The judge continued in that ruling:

> "Congress has done no more (and no less) than to conclude, in their legislative wisdom, that judicial officers shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal (or a Petition for a Writ of Certiorari) to be detained unless the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Having here made the determination that such is not here, the case, defendant's motion for bail pending appeal must be denied." (Exhibit C, p.4).

It is noteworthy that the trial court had just denied various and numerous motions in arrest of judgment and motions for a new trial filed by the various defendants.

Thus, the trial court judge made a ruling that he found no substantial questions of law raised at the trial of the matter. At the same time as he denied all defendants' requests of post-conviction relief. It is submitted that to do otherwise would have been illogical on his part. The U.S.

Court of Appeal for the Fifth Circuit then held that the Bail Reform Act may be applied retrospectively, holding that the law was procedural rather than substantive. Chief Judge Clark also stated that, since a transcript of the entire proceedings below was not available and because each of the decisions called for both factual and legal determinations, he was incapable of reversing the district court judge absent such a transcript. (Exhibit A, p.3).

Thus, Chief Judge Clark treated the matter differently than did the Third Circuit Court of Appeal in *U.S. v. Miller,* 753 F.2d 19 (3rd Cir. 1985) (App.G) and the Ninth Circuit Court of Appeal in *U.S. v. Handy,* ____F.2d____(9th Cir. Feb. 20, 1985, No. 85-3001). As a matter of fact, a co-defendant in this same matter, Dr. Salvatore Canale, also was judged by a different standard. *(U.S. v. Canale,* ____F.2d____,No.85-3050, March 28, 1985).

VI.
Issue Presented

A.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143(B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

B.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDEMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

VII.
Argument

A.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF 18 U.S.C. §3143(B)(2) WHICH REQUIRES A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL PRIOR TO ALLOWING A DEFENDANT TO REMAIN ON BOND PENDING HIS APPEAL.

The Bail Reform Act of 1984, 18 U.S.C.§3143, requires that a defendant moving for post-conviction bail demonstrate:

> "...that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2)

Petitioner does not contend that he has a constitutional right to post-conviction bail. This has never been

held to be an outgrowth of the Eighth Amendment's Excessive Bail Clause. In fact, this argument has been specifically rejected. *Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525 (1962). Nor does petitioner claim that he is necessarily entitled to bail pending appeal under the current rules of the Fifth Circuit Court of Appeal. *U.S. v. Bright,* 541 F.2d 471, 477 (5th Cir. 1976), *cert. denied* 430 U.S. 935 (1977). It is petitioner's contention, however, that the Bail Reform Act of 1984 must be read in such a way as to make it a meaningful statute since Congress undoubtedly had the power to completely outlaw post-conviction bail and chose not to.

The January 25, 1985 Minute Entry (Exhibit C) in this matter, in which the trial court denied applicant's motion to remain on bond, contained only the district court's conclusion as to the absence of substantial issues. It did not address any of the issues which applicant raised in his Motion to Remain on Bond Pending Appeal (Exhibit B.) In fact, several co-defendants in the matter filed similar motions which contained issues which they considered substantial and these were not addressed either. The trial court offered only the conclusion that no such issues exist:

> "...though certain decisions which the government's attorneys made with respect to the method of presentation of their case may have been different than those which I might have made under the circumstances, I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal or appeal. Nor were there any substantial questions or law or fact which will result in a new trial." Minute Entry, January 25, 1985. (Exhibit C).

The trial court then concluded:

> "Having made the determination that such is not here the case, defendants' motions for bail pending appeal must be denied." Minute Entry, January 25, 1985. (Exhibit C).

The trial court judge stated the same at the time of the sentencing saying:

> "Now, I've got to say there isn't any issue existing at this time, which I perceive to be responsive to the conditions that are imposed by this provision of the law, and as Congress has, in their wisdom, seen fit to enact." (Exhibit D, pp.47-48).

It is submitted that the trial court could not find otherwise, having just denied numerous motions in arrest of judgment and motions for a new trial filed by various defendants herein. This highlights the highly illogical position in which a trial court judge is placed if 18 U.S.C. §3143(b)(2) is interpreted as it was by the district court in this matter. The Third Circuit Court of Appeals reversed a similar line of reasoning in *U.S. v. Miller,* 753 F.2d 19 (3rd Cir. 1985). In that case the trial court felt, as did the trial court in the instant case, that he was required to find that one or more of its orders was likely to be reversed on appeal in order to permit a post-conviction bond. The Third Circuit reversed and remanded the decision reasoning that to do so was illogical and would in fact make the federal courts "bookmakers." It adopted, instead, a four-part test for determing whether a bond pending appeal should be granted. None of that was done in this instance.

Any discussion of post-sentence bail must begin with two basic premises. The first is that bail is essential to make meaningful the right of appeal. The second is that

Congress could, in fact, outlaw completely post-conviction bail but has chosen not to. The, second, it is submitted, is a reflection upon the importance of the first. Given the fact that Congress chose not to simply outlaw post-conviction bail, it is incumbent upon this Court to closely examine any interpretation of 18 U.S.C. §3143(b)(2) that would in effect deny post-conviction bail in all cases. Thus, the dilemma within which a trial court judge finds himself. As Judge Katz pointed out in *U.S. v. Meloni* (attached hereto as Exhibit F):

> "Now, the due process rights of the Constitution also guarantee that the defendant have an impartial tribunal deciding material issues. It's difficult for me to understand how an impartial judge would deny post-trial motions and then certify he is likely to be reversed on appeal. I can't conceive really how that is done. A statute which requires a court to make that determination before granting release on appeal does, to my mind, raise at least constitutional concerns." *Meloni, supra,* (Exhibit G) p.6.

Judge Katz continues in that case to effectively interpret the Bail Reform Act in a manner which is not abhorent to the Constitution and, in fact, makes it an effective piece of legislation. He distinguishes between those cases which merely present substantial legal issues and those which present substantial legal issues where there is no legal impediment to reversal by *stare decisis* or otherwise. Thus, a defendant may raise a substantial legal issue which has been passed upon by the U.S. Supreme Court, This type of issue would be one where the chances of reversal are remote. On the other hand, a defendant may raise those types of issues, such as sufficiency or admissibility of

evidence which must be reviewed on a case by case basis which bear no impediment to reversal. These types of issues are at the very heart of Mr. Crabtree's appeal and are the types of issues which cry for resolution by an impartial tribunal, which has not already had to rule on them during the trial.

In Mr. Crabtree's motion to remain on bond pending appeal, five issues were raised as serious issues for appeal:

a) The presence of a "contaminated" juror on the panel during the trial of the matter;

b) The lack of evidence of two seperate predicate acts as is required under 18 U.S.C. §1962;

c) The lack of evidence pertaining to the ruling of the trial court pursuant to *James* motions filed therein;

d) The impropriety of government counsel's rebuttal argument;

e) The admissibility of prejudicial tapes concerning Mr. Crabtree's wife.

Briefly, as to a) above, on the morning of the second day of the trial of the matter, an article appeared in the Major local daily newspaper (attached herein as Exhibit G) which contained a reference to co-defendant Provenzano's prior conviction. It should be noted that the government's theory of the case as reflected by testimony and, indeed, as demonstrated on charts displayed to the jury, was that defendant Provenzano was the titular and *de facto* head of an organized racketeering enterprise. He was, in effect, the hub of the illegal enterprises alleged. He was the sole defendant named in every count of the indictment. The trial court had not instructed the jury to disregard any media reports of the trial and, on motion of the defense after this article appeared, examined the jury to determine if any of the jurors had read the article. Three jurors indicated that

they had. All of the jurors were then sent to the jury deliberation room and the three who had indicated that they had read the article were called back into the courtroom individually and examined by the court. In the court's examination of the first juror, the court asked her if she had read of Mr. Provenzano's prior conviction as it was related in the article. While the juror said she did not recall noticing anything about the conviction, the very fact that Mr. Provenzano had been so convicted was brought to her attention inadvertently by the court. (See generally, Exhibit H, trial transcript dealing with that issue).

It is noteworthy that this prior conviction concerned an attack on a government witness with a shovel handle. That witness was, in fact, one of the chief government witness in the present trial. The juror was then instructed to return to the jury room and send out the next juror who had indicated having read the article. No admonishment was given to that juror to refrain from discussing with the other jurors what had occurred in court out of their presence. The two ramining jurors who had stated that they read the article were then examined without incident and returned to the jury deliberation room. The juror who had been initially examined was subsequently released from the jury and replaced by an alternate. The critical issue revolves around the lack of admonishment to the juror and the fact that she remained in the presence of the balance of the jury for some period of time after she was acquainted with this fact. It is also noteworthy that defendant Provenzano elected *not* to testify in this matter, and thus, this was the only way that the jury had of knowing of his prior conviction.

As to the lack of evidence of two separate predicate

acts, it is submitted that the government failed to prove that Mr. Crabtree participated in two separate predicate acts as required under 18 U.S.C §1962. He was alleged to have been involved in those two counts of the indictment which came to be known as Oil Patch I and Oil Patch II. These activities centered around two alleged aggravated arsons of a barroom in south Louisiana named The Oil Patch Lounge. The first arson occurred December 31, 1979 and the second occurred June 26, 1980. One government witness testified as to Mr. Crabtree's involvement in the planning of each. It was never alleged that he was present when the arsons occurred. The only evidence that the government could offer as to the first arson of the Oil Patch was through a witness named John Toal who testified merely that Mr. Crabtree was present when the arson of December 31, 1979 was discussed. He made no reference to Crabtree's participation in the planning or actual execution of the deed. Noteworthy under this heading is the fact that there was no physical evidence of Crabtree's involvement nor was he intercepted or recorded in any fashion in the over seven hundred hours of government wiretaps and consensual recordings in this matter.

Regarding the lack of evidence pertaining to the ruling pursuant to the "James" motions filed, it is submitted by the defense and will be argued most vigorously on appeal, that there was no independent evidence of Crabtree's involvement in a conspiracy as required by *U.S. v. James*, 590 F.2d 575 (5th Cir.) (en banc) *cert. denied* 442 U.S. 917 (1979). As stated above, he was not intercepted on any Title III wiretap nor was he recorded by any of the government informants in this matter during their extensive consensual taping of other defendants. Further, as stated above, there was no physical evidence of Crabtree's in-

volvement whatsoever.

Also on appeal in this matter will be the impropriety of government counsel's rebuttal argument which contains several *ad hominum* arguments, directed at various defendants and their counsel. Obviously this issue cannot be fully discussed until the entire transcript is prepared. That this circuit has, however, treated this in a serious fashion.

As to e) above, prior to the trial of the matter, both your petitioner's and defendant Provenzano's wife were placed under subpoena by the government. At trial, a tape was introduced into evidence by the government wherein these two discussed the possible sale of stolen goods. The government then elected to call neither as a witness after having introduced the tape through an informant who said that he could identify the voices of the participants. It is submitted that the tape was absolutely irrelevant to the matter at trial because neither woman was charged in the indictment and there were no counts against any defendant involving stolen goods. Further, Crabtree was in no way even alleged to have known of that particular act. In short, it served only to show a proportedly deep relationship between Crabtree's family and Provenzano's family. This could only serve to, if not inflame the jury, at least show that Mrs. Crabtree as well as defendant Crabtree knew people whom the government thought to be evil.

It is also noteworthy that in Chief Judge Clark's opinion he stated that, absent a transcript or a stipulation as to the facts, he could not overturn the trial court's decision since that judge was more familiar with the factual and legal issues presented. (Exhibit A, p.3). Thus, it would seem that the availability of post-conviction relief to a defendant would hinge, more than ever, on his ability to

finance his defense, In this case three of the seven defendants were represented by appointed counsel, having been found indigent at the outset of the litigation. These defendants would be precisely in petitioner's position now were they applying for this type of relief. Had your petitioner anticipated this problem, he may well have been able to afford a private court reporter who could have provided him with daily transcripts. He would, then, have the transcript necessary in order to proceed while his co-defendants would have to remain in jail pending the production of the transript in the ordinary course of the appellate process. Parenthetically, that transcript is still not available. If this standard is to be invoked, every indigent defendant will have to request fees for an independent court reporter to provide him with daily transcripts so that he can remain on the same footing as a more wealthy co-defendant.

II.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C. §3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

As stated above, the instant offenses for which your defendant has been convicted occurred in 1979 and 1980. On October 12, 1984, Public Law No. 94-473, 98 Stat. 1837 was signed into law. Title II of that statute bears the popular name "Comprehensive Crime Control Act of 1984." Within Chapter I of the Act is found the law regulating bail and is popularly referred to as the "Bail Reform Act of 1984." This law substantially revised the

rules governing bail pending appeal. Both the old and new laws set up a two-prong test to determine whether or not a convicted defendant could remain on bond pending the completion of the appeal. The first hurdle was and is a requirement that the defendant show by "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or to the community if released." 18 U.S.C. §3143(b)(1). The revision now requires the defendant to also demonstrate that the appeal is not "for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C. §3143(b)(2). The prior statute, 18 U.S.C. §3148, required a finding that the appeal was not frivolous or merely taken to delay proceedings. It should be noted that Rule 9(c) of the Federal Rules of Appellate Procedure made it clear that, while the burden was on the applicant to establish the absence of the likelihood of flight or danger, the burden for establishing that the appeal was frivolous or dilitory was placed squarely on the government.

Further, it should again be noted that the trial court judge stated that he was only concerned with the second element of the test in this case, and was not concerned with the likelihood of flight or the defendants posing a danger. The question is, then, one of interpretation of 18 U.S.C. §3143(b)(2) and its applicability to a defendant who was convicted of crimes which occurred before its date of enactment.

Counsel could find no published opinions dealing with the application of the pertinent amendments to offenses predating the effective date or with the interpretation of the statute as a whole. It is submitted that because the

Bail Reform Act of 1984 has only been in effect since October 12, 1984, that this issue is *res nova*.

While it is hornbook law that a procedural change in the law is applicable immediately to all cases pending, Judge Susan Getzendanner, United States District Judge for the Northern District of Illinois, Eastern Division, in *United States v. Cirrincione* (attached hereto as Exhibit I), pointed out that there are procedural matters which may have sufficient effect upon a defendant's substantive rights as to cause them to fall within the ambit of the *ex post facto* prohibition. She then continued, citing *Weaver v. Graham*, 450 U.S. 24 (1981), that the test to determine whether or not a penal law can be held to be *ex post facto* is as follows:

> "...It must apply to criminal acts occurring before its enactment into law, and it must disadvantage the offender affected by it. The Bail Reform Act of 1984 facially fits these criteria. First the act retrospectively affects all defendants whose crimes occurred before the effective date of the Act, October 12, 1984. Second, the Act severely limits the availability of bond pending appeal and is disadvantageous to defendants who routinely seek to delay commencement of their sentences by obtaining release on bail pending appeal." *Cirrincione, supra*, (Exhibit __) p.6.

It should be clear that the effects of this Act are punitive and disadvantageous to Crabtree. It is very likely that he will have served a substantial portion of his sentence prior to the time that this litigation is finally resolved. Should his conviction be reversed or set aside altogether and a verdict of acquittal entered, he would then have been denied his liberty needlessly and for a substan-

tial period of time. This increase in the likelihood of an unjust incarceration cannot be rationally viewed as a simple matter of procedure. Analogizing the instant case to the situation addressed in *Weaver, supra*, wherein the Supreme Court found that a statute reducing "good time" credits was an *ex post facto* application of the law it is clear that application of the Bail Reform Act of 1984 to offense committed before the effective date of the Act is similarly violative of that prohibition.

VIII.
Conclusion

In short, if the Bail Reform Act of 1984 is given the construction afforded to it in this case, it will be either unworkable or illogical. Either a defendant will have to be able to afford private transcription services or the trial court judge will be placed in the position of having to deny a post-conviction motion regarding new trial issues and then having to reverse himself by finding substantial legal issues will be raised.

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APPENDIX

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3050

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HUBERT T. CRABTREE,
Defendant-Appellant.

Application for Release related to
Appeal from the United States District Court
for the Eastern District of Louisiana

(February 22, 1985)

ORDER:

After conviction and sentence, Hubert T. Crabtree applied to the district court to continue his bail terms pending appeal. The district court denied the application, finding that the trial generated no substantial questions of law or fact that were likely to result in reversal on appeal or

order for a new trial. Crabtree has now applied to me as a judicial officer authorized to order release from detention pending appeal under 18 U.S.C. §3141 to allow him to retain his bail status pending appeal of the district court's ruling on his application and our ruling on his appeal from his conviction and sentence.

Crabtree indicates he will raise five issues on the latter appeal: (1) the presence of a "contaminated" juror on the panel during trial; (2) the lack of evidence of two separate predicate acts required under 18 U.S.C. §1962; (3) the lack of evidence with respect to the court's ruling on a motion under U.S. v. James, 590 F.2d 575 (5th Cir. en banc),*cert. denied,* 442 U.S. 917 (1979); (4) the impropriety of government counsel's rebuttal argument; and (5) the admissibility of prejudicial tapes concerning Crabtree's spouse.

18 U.S.C. §3143 (b) provides in pertinent part:

> (b) Release or Detention Pending Appeal by the Defendant. The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —
>
> > (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community of released pursuant to section 3143(b) or (c); and
> >
> > (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likley to result in reversal or an order for a new trial.

Under Federal Rule of Appellate Procedure 9(c), the burden of establishing the criteria enumerated in §3143(b) rests with Crabtree. In this application proceeding, he need not be concerned with the need for a showing by clear and convincing evidence that he was not likely to flee or pose a danger to the community. The district court made that finding in his favor and I will not disturb it. The remaining tests are whether the appeal (a) is taken for the purpose of delay, (b) raised a substantial question of law or fact, and (c) is likely to result in reversal or an order for a new trial.

There is no reason to pass on whether delay or insubstantiality are present because Crabtree has failed to carry the burden imposed on him to show that his appeal is likely to result in reversal or a new trial order. Crabtree's application is presented to me without a transcript. Crabtree acknowledges that the issue he raises as to improper argument of counsel must depend on an examination of the transcript. In the brief he has filed in support of his application, the remaining issues are discussed in factual terms which Crabtree proffers without record support. The brief of the government in opposition contends that I cannot find that the district judge who heard the case abused his discretion in ruling that the appeal was not likely to result in a reversal or an order for a new trial. Regardless of whether this application should be considered as a review of the action of the district judge and, if so, whether the proper standard of review is abuse of discretion or the clearly erroneous test, or whether the application is addressed to me for independent action, I must refuse relief.

Two things are clear. Section 3141 vests in the district judge the authority to make the identical determinations which Crabtree seeks to have me make; and those deter-

minations, in this case, call for a decision which is both factual and legal as to every issue Crabtree seeks to raise. The judicial officer who first made the decisions was conversant with the facts involved. I am not. In such a situation, any meaningful review or independent reconsideration by me must await a proper transcript or stipulated factual record. Since Crabtree has not produced such a transcript or record, he has failed to demonstrate that the issues he seeks to raise are likely to result in reversal of the conviction and sentence or in an order for a new trial. Thus, he has failed to carry the burden imposed on him by Rule 9(c). *Cf.* United States v. Miller,____ F.2d____(3rd Cir., Jan. 18, 1985, Nos. 83-4030, 83-4032). My order obviously does not predict what a subsequent judicial officer or panel of this court might rule on any such issue when a transcript or factual stipulation accompanies any further request for relief.

Crabtree also argues that the Bail Reform Act of 1984 violates the ex post facto clause of the United States Constitution. I disagree. Although the offense took place before the effective date of the Act, the change in the law is merely procedural and does not alter a substantial right. The Act does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt. *See* Weaver v. Graham, 450 U.S. 24, 29n.2, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), citing Hopt v. Utah, 101 U.S. 574, 590, 4 S.Ct. 202, 28 L.Ed. 262 (1884). In *U.S. v. Miller, supra,* the Third Circuit found that the Bail Reform Act of 1984 was procedural and did not offend the ex post facto clause.

The Act changes the manner in which convicted defendants will be dealt with after conviction. It contains a presumption in favor of immediate detention upon convic-

tion rather than the former requirement that a convicted defendant be enlarged on bail absent certain conditions. However, this court has held that a defendant who has been found guilty by jury and sentenced is not necessarily entitled to bail pending appeal as a matter of law. U.S. v. Bright, 541 F.2d 471, 477 (5th Cir. 1976), *cert. denied*, 430 U.S. 935 (1977). Even though the change works to the disadvantage of the defendant, it is merely a procedural change and does not offend the ex post facto clause. *See* Dobbert v. Florida, 432 U.S. 282, 293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

The application for release is DENIED.

/S/

CHARLES CLARK
CHIEF JUDGE

"APPENDIX B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

VERSUS

JOSEPH ROBERT PROVENZANO, a/k/a "JUNIOR";
HUBERT CRABTREE, a/k/a "HUEY";
HERBERT THIBODEAUX; DR. NATCHEZ MORICE;
DR. SALVATORE CANALE; HAROLD BLANCHARD;
JOSEPH MANZELLA, JR.; JOSEPH JIMENEZ, JR.

CRIMINAL DOCKET NO: 84-103

Section: M

VIOLATIONS: 18 U.S.C. 1962(c)
18 U.S.C. 1962 (d)
18 U.S.C. 1341
18 U.S.C. 1952 (a)(3)
18 U.S.C. 2

CRABTREE'S MOTION AND INCORPORATED MEMORANDUM TO REMAIN ON BOND PENDING APPEAL

Now into this Honorable Court, through undersigned counsel, comes Hubert Crabtree, defendant herein, who respectfully moves this Court to allow him to remain at large on his bond pending the completion of the appellate process for the reasons stated herein below:

1. On December 21, 1984, your defendant was found guilty in Counts I and II of the indictment herein. At that time the government moved for his immediate detention stating it feared that defendant would flee the jurisdiction.

2. At that time the Court stated that it was aware of the Bail Reform Act of 1984 and its duties thereunder. The Court increased defendant's bail and gave him stringent orders on reporting to his case worker in the U.S. Probation and Parole Department.

3. Your defendant has faithfully complied with all of these requirements.

4. Your defendant is the sole support of his wife and two adopted children and has posted as his bond herein a collateral mortgage on the family home for very nearly all of its appraised value thereby making flight highly unlikely.

5. It is your defendant's intention to raise the following serious issues on the appeal of the matter herein:

a) The presence of a "contaminated" juror on the panel during the trial of the matter;

b) The lack of evidence of two separate predicate acts;

c) The lack of evidence pertaining to the ruling pursuant to the "*James*" motions filed herein;

d) The impropriety of government counsel's rebuttal argument;

e) The admissibility of prejudicial tapes concerning your defendant's wife.

6. The appeal taken upon these and other issues is, therefore, not taken as a frivolous or delaying tactic.

7. The government has failed to show that your defendant's status has in any way changed or that he is more likely to flee at the present time than when it originally urged his detention. We submit that this failure to go forward should, therefore, mandate continuation of his present status pending the appeal of this matter.

Respectfully submitted:

JOHN-MICHAEL LAWRENCE
WILLIAM J. O'HARA, III
LEMANN, O'HARA & MILES
400 Lafayette Street
Suite 100
New Orleans, Louisiana 70130
Phone: (504) 522-8104

Attorneys for Defendant,
Hubert Crabtree

CERTIFICATE

I hereby certify that a copy of the above and foregoing document has been served upon opposing counsel by hand delivery this 23rd day of January, 1985.

/S/
JOHN-MICHAEL LAWRENCE

APPENDIX "C"

MINUTE ENTRY
BEER, J.
JANUARY 25, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
JOSEPH ROBERT PROVENZANO,
ET AL

CRIMINAL ACTION
NUMBER 84-103
SECTION M

Before the Court, by written motion and, in some instances, oral motion of counsel for various defendants, is a consideration of the question of detaining the defendants pending appeal.

All defendants before the Court in these proceedings (except defendant Provenzano, who has already commenced serving a term of imprisonment) are to self-surrender at the institution where they will serve their prison sentence by noon on February 6, 1985. Thus, time is a definite consideration in dealing with these motions.

The record in these proceedings will authenticate that defendants were able and diligently represented and fairly tried in a trial that lasted approximately three weeks. At

the conclusion of the evidence gathering portion of the trial, all defense counsel were accorded an extended period in which to make their closing arguments, after which the jury was charged and then began their deliberations. Those deliberations continued over a period of four days. The jury seriously and conscienciously went about their work. The verdict rendered by them speaks clearly to the point that they carefully considered each count as to each defendant. Indeed, it may now be noted that I had some concern about the government's proof regarding one or two of the counts upon which the jury did, in fact, return not guilty verdicts. I did agree in all respects with their verdict as to each count involving each defendant.

Equally as diligent as the able defense counsel were the attorneys presenting the government's case. Though certain decisions which the government's attorneys made with respect to the method of presentation of their case may have been different than those which I might have made under the circumstances, I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal. Nor were there any substantial questions of law or fact which will result in an order for a new trial.

Squarely before me, then, is the matter of determining whether I am empowered to grant defendants' motions. I conclude that I am not. For, having made the factual and legal determination above referred to, I find the provisions of 18 U.S.C. §3143 to be clear, unambiguous and straightforward.

The report of the Senate Judiciary Committee regarding the statute here involved included a detailed discussion

of the change brought about as a result of the Comprehensive Crime Control Act of 1984. See: S. Rep. No. 98-225, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News, Vol. 9A, p. 29.

The legislative history of the statute includes the following:

> "It has been held that although denial of bail after conviction is frequently justified, the current statute incorporates a presumption in favor of bail after conviction. It is the (sic)[1] presumption that the Committee wishes to eliminate in Section 3143."

The report further states that:

> "Once guilt of a crime has been established in a court of law, there is no reason to favor release pending ... appeal. The conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.
>
> Second, release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years." *Id.*

District courts similarly confronted seem to have split on whether they will or will not follow what I perceive to be a clear, unequivocal mandate from the Congress. For example, a memorandum opinion of Honorable Susan Getzen-

---

[1] I believe this word was intended to be "this" instead of "the."

danner, United States District Judge for the Northern District of Illinois, reached an opposite result in *United States of America v. Biagio Cirrincione, et al,* No. 82-CR-778 (N.D. Ill., Jan. 16, 1985).

Judge Getzendanner reasons:

> "The apparent purposes of the Act - to eliminate dilatory appeals and to help deter crime - are laudatory ones, but may not be used to enhance punishment of those who committed unlawful acts in possible reliance on previous standards." Slip op. at 21.

I am in disagreement with this rationale and with the conclusion that the congressional mandate embodied in the Comprehensive Crime Control Act of 1984 is being "used to enhance punishment." Here there is no enhancement of punishment. Congress has simply spoken clearly to the point at issue. They have revised the manner in which convicted defendants will be dealt with after conviction, and their mandate is to be followed on the basis of its fair, reasonable and sensible construction compatible with the apparent object and plain intention as expressed therein.

There is no constitutional guarantee of bail pending appeal. See *United States v. Baca,* 444 F.2d 1292 (10th Cir.), *cert. denied,* 404 U.S. 979 (1971). Furthermore, Judge Getzendanner, apparently acknowledging this, has observed:

> "To the extent that the post-conviction bail provision of the new Act is regulatory and not

> punitive, it necessarily falls outside the prohibitions of the ex post facto clause:. . ."

However, she determines that:

> ". . .Congress must have concluded that a sentence which commences immediately upon conviction is somehow more severe than a sentence which commences only after appeal." Slip op. at 15-17.

I believe this to be an inaccurate observation. Congress has done no more (and no less) than to conclude, in their legislative wisdom , that judicial officers shall order a person who has been found guilty of an offense and sentenced to a term of imprisonment and who has filed an appeal (or a petition for a writ of certiorari) be detained unless the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial. Having here made the determination that such is not here the case, defendant's motions for bail pending appeal must be denied.

/S/
PETER BEER
COUNSEL OF RECORD

APPENDIX "D"

* * * * * * * *

assume it applies that, point one, of the new act, by clear and convincing evidence the person is not likely to flee or poses any danger to the community. At least, the Court makes a finding, as far as Dr. Canale, that this has not been the issue.

It was the second one --

THE COURT: Well, I haven't made a finding one way, or the other, as far as anybody is concerned. I have just done what probably most district judges do in a situation between a finding of guilty by the jury and the imposition of sentence.

I've made a decision to let the defendants remain on bond pending the imposition of sentence by the Court. Now, whatever is implicit in that decision that I made, is implicit.

I will state on the record, that I have no different feeling about the defendant Canale, than I do about any of the other defendants, and that is, that I would not deprive him, any more, or less than any of the others, of the opportunity to have whatever advantages the Federal Bureau of Prisons ascribes to self surrender, as any of the other defendants. That's basically the way I feel about the other defendants, and about the defendant Canale.

MR. CAPITELLI: I appreciate that, Your Honor, because I also filed a motion to self surrender this morning,

based on that, as I appreciate that.

THE COURT: Well, I understand that.

MR. CAPITELLI: I just needed that point clarified.

But, in terms of the motion to remain on bond, Your Honor, the new provision that really comes into play is the second point, the likely result in reversal, or an order for a new trial. Based on the ability to self surrender and that Court position on that, I would forego putting Dr. Canale on the stand to reiterate that he is a doctor, his background, and all the things that this Court already knows, because it just deals with point one, which is the issue that flight and the danger to society.

THE COURT: I don't think that's necessary.

MR. CAPITELLI: Thank you.

Also, Your Honor, as to the second point, we deal with, and I hope I feel, based on all the proffers that were made and strenuous arguments by counsel and the documentation, that the Court, in terms of this appeal, I will state for the record, certainly is not in any way appeal on Dr. Canale's part being made for a delay, or a frivolous nature, and we feel we are dealing with, in my motion, the second part of my motion, Your Honor, is really too late for this Court to review it in depth, deals with the substantive issues that were raised during the trial, Your Honor, as concerns in particular the point, and that is cited in Judge Getzendanner's opinion, concerning ex post facto nature of the application of this law to Dr. Canale and the other co-defendants. I would ask the Court to look especially at the

fact that Dr. Canale was charged with events that occurred in 1979, and in early February — excuse me, of 1982. The Government had a right within the prescriptive period to pursue their case at their own speed, and chose to investigate it and pursue the acts that they felt were sufficient to bring to Court at their speed. The acts

* * * * * * * *

THE COURT: All right, I say this, Mr. O'Hara is present, so I will let him make the statement at this time with respect to whether he wishes to persist in the motion for continuance.

MR O'HARA: No, sir, that's all right, I will go forward with it, now, with everything.

THE COURT: Well, I appreciate the fact that you are here, Mr. O'Hara, and I certainly don't intend to do anything that would in any way jeopardize your health.

MR. O'HARA: No, sir, it wasn't a life threatening thing, he just told me to take a couple of days off until the lungs cleared up.

THE COURT: Well, with your consent, I would like to go ahead and proceed, then, with respect to the motions which you have made in behalf of defendant Crabtree.

MR. O'HARA: Yes, sir.

THE COURT: And I will hear you, now.

Let me say that I think, just to put you in the picture, or help you out in terms of the argument on the issue of in-

carceration pending appeal has been pretty fully argued, and I realize that your concerns on behalf of Mr. Crabtree would certainly be such that I would not deprive you of adding to that in any way that you wish to add to it, except to say to you that I think both sides of it have been pretty fully aired.

MR. O'HARA: Yes, sir.

Very briefly, Your Honor, since I don't know what was said, on behalf of Mr. Crabtree, as I stated in the motion, it would seem to me that when the jury returned, and the Government at that point moved for detention, Your Honor stated that he had taken the facts and the new law into account and raised Mr. Crabtree's and Mr. Provenzano's bonds, and I believe Mr. Thibodeaux's and Mr. Blanchard's, also. Those obligations have been met and that absent some showing by the Government, that either the conditions of the bond having been met or that there is some new evidence to change Your Honor's opinion since the date the jury came in on December 21st, that I believe the situation is the same as it was, then.

THE COURT: Well, I realize that you are catching us kind of on the second go around here, but I don't have any trouble with that, as far as not ordering incarceration of any defendant between the time of verdict and the time of sentencing. But, what I am having a lot of trouble with is the next provision of the Crime Control Act of 1984, which provides a very stringent basis upon which I must decide whether or not to order incarceration pending appeal, not pending sentencing.

You are right about -- I mean, I made my decision

about that and to the defendants' credit and that of their attorneys, they have lived up to that and they are all here and they have done what they are supposed to do, as far as being present. So, they have convinced me of the correctness of my having faith in them to showing up here today, consistent with my order.

The things that I am very much confronted by, right now, is the next provision of the Crime Control Act which says that the appeal is not for the purpose of delay and raises the substantial question of law, or fact, likely to result in reversal, or an order for a new trial. And if you want to address that in Mr. Crabtree's behalf, go ahead.

MR. O'HARA: Yes, sir, very briefly, because I believe, and beyond the Court, of course, but I believe the wording in that statute is very unfortunate and puts Your Honor in a very difficult position. I don't see where this trial court judge can say yes, I think there is substantial areas of disagreement and a likelihood of a reversal, when Your Honor has already ruled on the matters that are subject to the appeal. If Your Honor please, certainly if Your Honor believed that there were substantial errors, I would think Your Honor would be forced to grant a new trial, However, I can, within the framework of the law, and where intelligent men may disagree, I believe that there be substantial issues to be raised on appeal and this I have listed five of them in my motion which I intend to appeal very vigorously. It's not a situation where we have a blank record on appeal. The case was tried strenuously by both sides, by the Government and by the defense, and I believe there are some substantial issues to be argued on appeal. So, certainly, the appellate work in this case is not done simply for the purpose of delay, and further that and again

it goes back, I realize Your Honor, what Your Honor says goes from the point of the jury returning the verdict up until the sentencing, but the requirements have been met, and during this period Mr. Crabtree, at this point, is living under, or facing forty years imprisonment. And certainly, anything Your Honor does today won't exceed his fear of forty years, and may substantially lessen it by an actual number. That's about all I can say. I think the situation would be different if we were going forward on a blank transcript, or if we had done the trial by stipulation, or an issue like that. But, where it was litigated this hard, there are some close issues in here, I think the Government will concede that, I don't think that an appeal in this matter can be called frivolous, or just for terms of delay.

THE COURT: Thank you, sir. I assume that insofar as the motion for judgment of acquittal and alternatively for a new trial, that you submit that on the papers?

MR. O'HARA: Yes, sir, and on the record.

THE COURT: And I assume the Government submits their position on the papers.

MS. BITZER: Your Honor, we have never received a copy of those motions and I will be glad to respond to them within ten hours, or whatever, I just have never received a copy.

THE COURT: When was that filed? I have in my notes defendant Crabtree's motion for judgment of acquittal, or in the alternative for a new trial.

MR. O'HARA: I believe they were all filed the same day.

THE COURT: Well, I am going to deal with this --

MR. O'HARA: I apologize.

THE COURT: I am going to go ahead and deal with this on my own motion. I am satisfied that I have read the motion papers and I feel that insofar as the motion for new trial and for judgment of acquittal, they must be denied.

MR. O'HARA: To which ruling I respectfully note an objection.

THE COURT: All right, I am going to take under consideration the motions as they have to do with the question of the Crime Control Act of 1984, this is 18 U.S.Code

* * * * * * * * * * *

REPORTER'S CERTIFICATE

I, THOMAS H. CONRAD, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/

THOMAS H. CONRAD, CP, CSR
Official U. S. Court Reporter

APPENDIX "E"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO.

HUBERT T. CRABTREE,
Defendant-Appellant

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Application for Release After Judgment of Conviction
and Appeal from the United States District Court
for the Eastern District of Louisiana,
the Honorable Peter H. Beer, Judge, Section "M",
Denying the Same

**BRIEF FOR APPELLANT,
HUBERT T. CRABTREE**

William J. O'Hara III
John-Michael Lawrence
LEMANN, O'HARA & MILES
300 Lafayette Street
Suite 100
New Orleans, Louisiana 70130
Phone: (504) 522-8104

COUNSEL FOR APPLICANT

January, 1985

UNITED STATES OF AMERICA
STATE OF LOUISIANA

AFFADAVIT

BEFORE ME, the undersigned authority, personally came and appeared:

JOHN-MICHAEL LAWRENCE

who, after being sworn, did depose:

1) That he is one of the trial counsel for Hubert T. Crabtree in this action;

2) That he has attempted to contact the court reporter in this action on several occasions since this application became necessary and has failed;

3) That the companion case of Dr. Salvatore Canale contains a certification that the transcript of the matter will not be prepared before February 9, 1985;

4) That all necessary arrangements have been made to assure the payment of the court reporter's fees.

/S/
John-Michael Lawrence

Sworn before me this
31st day of January, 1985.

/S/
Notary Public

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, appeared William J. O'Hara III, who, after being duly sworn, did depose and say that:

1. He is counsel for Hubert T. Crabtree;

2. The transcript of the proceedings relative to applicant's Motion to be Released on Bond Pending Appeal is not filed with the attached application for the following reasons:

A. The hearing took place on January 23, 1985.

B. The transcript has been ordered from Tom Conrad, the court reporter, but has yet to be completed.

/S/
WILLIAM J. O'HARA III

Sworn to and subscribed before me,
this 30th day of January, 1985.

/S/
NOTARY PUBLIC

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL.

II.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C.§3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

STATEMENT OF PERSONAL FACTS

Hubert T. Crabtree has been a resident of Marrero, Louisiana since 1956, moving there from his native Florida. He married Katherine Crabtree and adopted her two children of a previous marriage, Claudia Jennette, age 17, and Kerry Vernon, age 19. He remains the sole support of this family. He has lived at his present address for over ten years. This is the same property upon which a collateral mortgage was executed to serve as his bond.

He has spent the majority of his adult life in oil related businesses. Mr. Crabtree has an ownership interest in Casper Equipment Rentals, an oil field equipment company located in Casper, Wyoming. This corporation was begun in 1977. He expanded his business in Louisiana and formed a separate corporation, Diamond C Tool Rentals, in Marrero, Louisiana over a year ago. Prior to that, since

1978, he was doing business as Diamond C Tool Rentals of Casper, Wyoming.

A complete work history, as well as record of convictions and character references is contained in the presentence investigation. Mr. Crabtree cooperated fully in its preparation. It should be noted that Mr. Crabtree has faithfully complied with every requirement of his bond throughout the course of this litigation and, in fact, was informed as early as the summer of 1983 that he would be a target in the investigation. The actual indictment was not returned until 1984.

STATEMENT OF CASE

On December 21, 1984, applicant, Hubert T. Crabtree, was convicted in Case Number 84-103(M) of the United States District Court for the Eastern District of Louisiana on two counts of "racketeering" under 18 U.S.C.§§1962(c) and 1962(d). On January 23, 1985, Mr. Crabtree was sentenced to a prison term of three years and four months on each count (concurrent) and ordered to pay a fine of $12,500.00 on each count. He was assigned a surrender date of February 6, 1985.

When Mr. Crabtree was originally arrested and charged in this indictment, he posted a property bond in the amount of $100,000.00, using his family domicile as the basis for the collateral mortgage therein. At all times prior to the trial of the matter, Mr. Crabtree faithfully discharged all of his obligations toward remaining free on that bond. Then he was convicted on December 21, 1984, the government moved for his immediate detention. Four of the original eight co-defendants were so singled out by the

attorney for the United States. A specific reason for the request for detention of each defendant was given. In Mr. Crabtree's case, it was stated that there was fear on the part of the government that he would attempt to flee the jurisdiction because of his substantial business interests in the state of Wyoming. At that time, the trial court judge, the Honorable Peter Beer, after listening to argument by both the government and defense, decided to amend defendant Crabtree's bond as follows:

1. The amount of the bond was increased to the sum of $250,000.00;

2. Mr. Crabtree was to report in person on Friday of each week to the U.S. Department of Probation and Parole;

3. Mr. Crabtree was to contact the U.S. Department of Probation and Parole by telephone on each Monday.

All of these provisions were complied with, the defendant placing a collateral mortgage in the sum of $200,000.00 on his family residence and using a commercial surety bond for the balance of $50,000.00. The commercial surety bond was made necessary because the family residence, the only piece of real property owned by Mr. Crabtree in the State of Louisiana, was appraised at approximately $226,000.00, making it inappropriate for the entire bond. Mr. Crabtree faithfully complied with all of the provisions of this bond arrangement until the date of his sentencing, January 23, 1985.

On that date he received the sentence enumerated above, and also filed with the district court a Motion to Re-

main on Bond Pending Appeal. Judge Beer took this motion under advisement until January 25, 1985, at which time he denied the motion and ordered your defendant to surrender on February 6, 1985 at a federal detention center to be designated by the U.S. Bureau of Prisons.

At the hearing of applicant's motion to remain free on bond pending appeal, the district court judge stated that he was compelled to apply the Bail Reform Act of 1984 to the instant case in spite of the fact that the predicate acts allegedly committed by applicant occurred in 1979 and 1980. The court did not feel that the application of the Bail Reform Act of 1984 to the instant case was violative of the ex post facto clause of Article I, Section 9, of the United States Constitution.

It is indeed noteworthy that on both December 21, 1984 and January 23, 1985 the court stated that it was aware of its duties pursuant to that statute, 18 U.S.C.§3143. Further, on January 23, 1985, the court stated that it was solely concerned with the provisions of 18 U.S.C.§3143(b)(2), that section of the Act which changes the standards to be applied from those of a "merely frivolous" appeal to one which places a burden on the defendant to show that the appeal "raises a substantial question of law or fact likely to result in reversal or a new trial." This brief will, therefore, concern itself primarily with that portion of the statute as well as with other problems concerning the application of that statute to the instant case rather than the entire provisions of the statute. This is done because the trial court has already determined that there is little or no likelihood of your defendant fleeing or posing a danger to the safety to any other person or to the community if he is maintained on his present bond.

RELIEF SOUGHT

Based on the case as it has thus unfolded, your defendant seeks the following relief:

1). Applicant seeks an Order from this Court allowing him to remain on bond in his present status pending the resolution of this appeal from the trial court's Minute Entry of January 25, 1985. (Attached hereto as Exhibit A).

2). Applicant seeks to remain on bond during the entire pendency of the appeal of this matter due to the erroneous interpretation of 18 U.S.C.§3143(b)(2) by the district court in denying his Motion to Remain on Bond Pending Appeal. (Attached hereto as Exhibit B).

3). Applicant seeks, alternatively, to be allowed to remain on bond during the pendency of the entire appeal of this matter due to the erroneous application of 18 U.S.C.§3143(b)(2) to the instant case because it is violative of the *ex post facto* clause of the United States Constitution.

ISSUES PRESENTED

I.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL.

II.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C.§3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

ARGUMENT

I.

WHETHER THE DISTRICT COURT IMPROPERLY INTERPRETED THE REQUIREMENT OF A SUBSTANTIAL ISSUE ON APPEAL LIKELY TO RESULT IN REVERSAL OR AN ORDER FOR A NEW TRIAL.

The Bail Reform Act of 1984 requires that a defendant moving for post conviction bail demonstrate:

> "...that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143(b)(2).

The January 25, 1985 Minute Entry (Exhibit A) in this matter, in which the trial court denied applicant's motion to remain on bond, contained only the district court's conclusion as to the absence of substantial issues. It did not address any of the issues which applicant raised in his Motion to Remain on Bond Pending Appeal (Exhibit B). In fact, several co-defendants in the matter filed similar motions which contained issues which they considered substantial and these were not addressed either. The trial court offered only the conclusion that no such issues exist:

> "...though certain decisions which the government's attorneys made with respect to the method of presentation of their case may have been different than those which I might have made under the circumstances, I have no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal or appeal. Nor were there any substantial questions of law or fact

> which will result in a new trial." Minute Entry, January 25, 1985. (Exhibit A).

The trial court then concluded:

> "Having made the determination that such is not here the case, defendant's motions for bail pending appeal must be denied." Minute Entry, January 25, 1985. (Exhibit A).

It is submitted that the trial court could not find otherwise, having just denied numerous motions in arrest of judgment and motions for a new trial filed by various defendants herein. This highlights the highly illogical position in which a trial court judge is placed if 18 U.S.C.§3143(b)(2) is interpreted as it was by the district court in this matter.

Any discussion of post-sentence bail must begin with two basic premises. The first is that bail is essential to make meaningful the right of appeal. The second is that Congress could, in fact, outlaw completely post-conviction bail but has chosen not to. The second, it is submitted, is a reflection upon the importance of the first. Given the fact that Congress chose not to simply outlaw post-conviction bail, it is incumbent upon this Court to closely examine any interpretation of 18 U.S.C.§3143(b)(2) that would in effect deny post-conviction bail in all cases. Thus, the dilemma within which a trial court judge finds himself. As Judge Katz pointed out in *U.S. v. Meloni* (attached hereto as Exhibit C):

> "Now, the due process rights of the Constitution also guarantee that the defendant have an impartial tribunal deciding material issues. It's difficult for me to understand how an impartial

> judge would deny post-trial motions and then certify he is likely to be reversed on appeal. I can't conceive really how that is done. A statute which requires a court to make that determination before granting release on appeal does, to my mind, raise at least constitutional concerns." *Meloni, supra,* (Exhibit C) p.6.

Judge Katz continues in that case to effectively interpret the Bail Reform Act in a manner which is not abhorent to the Constitution and, in fact, makes it an effective piece of legislation. He distinguishes between those cases which merely present substantial legal issues and those which present substantial legal issues where there is no legal impediment to reversal by *stare decisis* or otherwise. Thus, a defendant may raise a substantial legal issue which has been passed upon by the U.S. Supreme Court. This type of issue would be one where the chances of reversal are remote. On the other hand, a defendant may raise those types of issues, such as sufficiency or admissibility of evidence which must be reviewed on a case by case basis which bear no impediment to reversal. These types of issues are at the very heart of Mr. Crabtree's appeal and are the types of issues which cry for resolution by an impartial tribunal, having already been decided upon at the trial court level.

In Mr. Crabtree's motion to remain on bond pending appeal, five issues were raised as serious issues for appeal:

a) The presence of a "contaminated" juror on the panel during the trial of the matter;

b) The lack of evidence of two seperate predicate acts as is required under 18 U.S.C.§1962;

c) The lack of evidence pertaining to the ruling of the trial court pursuant to *James* motions filed therein;

d) The impropriety of government counsel's rebuttal argument;

e) The admissibility of prejudicial tapes concerning Mr. Crabtree's wife.

Briefly, as to a) above, on the morning of the second day of the trial of the matter, an article appeared in the Times Picayune newspaper (attached herein as Exhibit D) which contained a reference to co-defendant Provenzano's prior conviction. It should be noted that the government's theory of the case as reflected by testimony and, indeed, as demonstrated on charts displayed to the jury, was that defendant Provenzano was the titular and *de facto* head of an organized racketeering enterprise. He was, in effect, the hub of the illegal enterprises alleged. He was the sole defendant named in every count of the indictment. The trial court had not instructed the jury to disregard any media reports of the trial and, on motion of the defense after this article appeared, examined the jury to determine if any of the jurors had read the article. Three jurors indicated that they had. All of the jurors were then sent to the jury deliberation room and the three who had indicated that they had read the article were called back into the courtroom individually and examined by the court. In the court's examination of the first juror, the court asked her if she had read of Mr. Provenzano's prior conviction as it was related in the article. While the juror said she did not recall noticing anything about the conviction, the very fact that Mr. Provenzano had been so convicted was brought to her attention inadvertently by the court.

It is noteworthy that this prior conviction concerned an attack on a potential government witness with a shovel handle. That witness was, in fact, one of the chief government witnesses in the present trial. The juror was then instructed to return to the jury room and send out the next juror who had indicated having read the article. No admonishment was given to that juror to refrain from discussing with the other jurors what had occurred in court out of their presence. The two remaining jurors who had stated that they read the article were then examined without incident and returned to the jury deliberation room. The juror who had been initially examined was subsequently released from the jury and replaced by an alternate. The critical issue revolves around the lack of admonishment to the juror and the fact that she remained in the presence of the balance of the jury for some period of time after she was acquainted with this fact. It is also noteworthy that defendant Provenzano elected *not* to testify in this matter, and thus, this was the only way that the jury had of knowing of his prior conviction.

As to the lack of evidence of two separate predicate acts, it is submitted that the government failed to prove that Mr. Crabtree participated in two separate predicate acts as required under 18 U.S.C. §1962. He was alleged to have been involved in those two counts of the indictment which came to be known as Oil Patch I and Oil Patch II. These activities centered around two alleged aggravated arsons of a barroom in south Louisiana named The Oil Patch Lounge. The first arson occurred December 31, 1979 and the second occurred June 26, 1980. One government witness testified as to Mr. Crabtree's involvement in the planning of each. It was never alleged that he was present when the arsons occurred. The only evidence that the

government could offer as to the first arson of the Oil Patch was through a witness named John Toal who testified merely that Mr. Crabtree was present when the arson of December 31, 1979 was discussed. He made no reference to Crabtree's participation in the planning or actual execution of the deed. Noteworthy under this heading is the fact that there was no physical evidence of Crabtree's involvement nor was he intercepted or recorded in any fashion in the over seven hundred hours of government wiretaps and consensual recordings in this matter.

Regarding the lack of evidence pertaining to the ruling pursuant to the "James" motions filed, it is submitted by the defense and will be argued most vigorously on appeal, that there was no independent evidence of Crabtree's involvement in a conspiracy as required by *U.S. v. James*, 590 F.2d 575 (5th Cir.) (en banc) *cert. denied* 442 U.S. 917 (1979). As stated above, he was not intercepted on any Title III wiretap nor was he recorded by any of the government informants in this matter during their extensive consensual taping of other defendants. Further, as stated above, there was no physical evidence of Crabtree's involvement whatsoever.

Also on appeal in this matter will be the impropriety of government counsel's rebuttal argument which contains several *ad hominum* arguments directed at various defendants and their counsel. Obviously this issue cannot be fully discussed until the entire transcript is prepared. That this circuit has, however, treated this in a serious fashion.

As to e) above, prior to the trial of the matter, both your defendant's wife and defendant Provenzano's wife were placed under subpoena by the government. At trial, a

tape was introduced into evidence by the government wherein these two discussed the possible sale of stolen goods. The government then elected to call neither as a witness after having introduced the tape through an informant who said that he could identify the voices of the participants. It is submitted that the tape was absolutely irrelevant to the matter at trial because neither woman was charged in the indictment and there were no counts against any defendant involving stolen goods. Further, Crabtree was in no way even alleged to have known of that particular act. In short, it served only to show a proportedly deep relationship between Crabtree's family and Provenzano's family. This could only serve tc, if not inflame the jury, at least show that Mrs. Crabtree as well as defendant Crabtree knew people whom the government thought to be evil.

II.

WHETHER THE TRIAL COURT'S APPLICATION OF THE 1984 AMENDMENT TO 18 U.S.C.§3143 TO AN OFFENSE WHICH OCCURRED BEFORE ITS EFFFECTIVE DATE CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINST EX POST FACTO LAWS.

As stated above, the instant offenses for which your defendant has been convicted occurred in 1979 and 1980. On October 12, 1984, Public Law No. 94-473, 98 Stat. 1837 was signed into law. Title II of that statue bears the popular name "Comprehensive Crime Control Act of 1984." Within Chapter I of the Act found the law regulating bail and is popularly referred to as the "Bail Reform Act of 1984." This law substantially revised the rules governing bail pending appeal. Both the old and new

laws set up a two-prong test to determine whether or not a convicted defendant could remain on bond pending the completion of the appeal. The first hurdle was and is a requirement that the defendant show by "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or to the community if released." 18 U.S.C.§3143(b)(1). The revision now requires the defendant to also demonstrate that the appeal is not "for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." 18 U.S.C.§3143(b)(2). The prior statute, 18 U.S.C.§3148, required a finding that the appeal was not frivolous or merely taken to delay proceedings. It should be noted that Rule 9(c) of the Federal Rules of Appellate Procedure made it clear that, while the burden was on the applicant to establish the absence of the likelihood of flight or danger, the burden for establishing that the appeal was frivolous or dilitory was placed squarely on the government.

Further, it should again be noted that the trial court judge stated that he was only concerned with the second element of the test in this case, and was not concerned with the likelihood of flight or the defendants posing a danger. The question is, then, one of interpretation of 18 U.S.C.§3143(b)(2) and its applicability to a defendant who was convicted of crimes which occurred before its date of enactment.

Counsel could find no published opinions dealing with the application of the pertinent amendments to offenses predating the effective date or with the interpretation of the statute as a whole. It is submitted that because the Bail Reform Act of 1984 has only been in effect since October 12, 1984, that this issue is *res nova*.

While it is hornbook law that a procedural change in the law is applicable immediately to all cases pending, Judge Susan Getzendanner, United States District Judge for the Northern District of Illinois, Eastern Division, in *United States v. Cirrincione* (attached hereto as Exhibit E), pointed out that there are procedural matters which may have sufficient effect upon a defendant's substantive rights as to cause them to fall within the ambit of the *ex post facto* prohibition. She then continued, citing *Weaver v. Graham*, 450 U.S. 24 (1981), that the test to determine whether or not a penal law can be held to be *ex post facto* is as follows:

> "...It must apply to criminal acts occurring before its enactment into law, and it must disadvantage the offender affected by it. The Bail Reform Act of 1984 facially fits these criteria. First the act retrospectively affects all defendants whose crimes occurred before the effective date of the Act, October 12, 1984. Second, the Act severely limits that availability of bond pending appeal and is disadvantageous to defendants who routinely seek to delay commencement of their sentences by obtaining release on bail pending appeal." *Cirrincione, supra*, (Exhibit E) p.6.

It should be clear that the effects of this Act are punitive and disadvantageous to Crabtree. It is likely that he will have served a substantial portion of his sentence prior to the time that this litigation is finally resolved. Should his conviction be reversed or set aside altogether and a verdict of acquittal entered, he would then have been denied his liberty needlessly and for a substantial period of time. This increase in the likelihood of an unjust incarceration cannot be rationally viewed as a simple matter of procedure. Analogizing the instant case to the situation addressed in *Weaver, supra*, wherein the Supreme Court

found that a statute reducing "good time" credits was an *ex post facto* application of the law it is clear that application of the Bail Reform Act of 1984 to offense committed before the effective date of the Act is similarly violative of that prohibition.

On January 30, 1985, the Honorable Peter Beer, trial judge in this matter, denied defendant's motion to remain on bond pending appeal, a copy of which is attached hereto as Exhibit F.

Respectfully submitted:

/s/_____

WILLIAM J. O'HARA, III
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CERTIFICATE

I hereby certify that a copy of the above and foregoing document has been served upon opposing counsel by hand delivery this 31st day of January, 1985.

/s/_____

WILLIAM J. O'HARA, III

APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
UNITED STATES OF AMERICA

vs.

SAM MELONI,
Defendant

CRIMINAL NO. 84-00295

Philadelphia, PA
December 11, 1984
BEFORE THE HONORABLE MARVIN KATZ, J.

BENCH OPINION

TRANSCRIPT ORDERED BY: DONALD GOLDBERG, ESQ.

APPEARANCES:

For the United States:	FRANK H. SHERMAN Asst. United States Attorney Philadelphia, PA
For the Defendant:	DONALD GOLDBERG, ESQ. 1310 Three Girard Plaza Philadelphia, PA 19102
Court Reporter:	Nancy O'Neill Reusing Room 510, 35 North 6th Street Reading, PA 19601

EXCERPT FROM THE PROCEEDINGS

THE COURT: Have both sides had a chance to review the presentence report?

MR. GOLDBERG: Yes, sir.

MR. SHERMAN: Yes, sir.

THE COURT: And let me – Maybe it would be better if we proceeded this way. I had the benefit of your arguments on the issue of Section 3142, and perhaps it would be better if I ruled on that at the present time and then, of course, I will hear you fully on the issue of sentence. If after hearing both sides, I do sentence the defendant to a term of imprisonment, I must then decide whether his bail may continue pending appeal.

The release of a defendant pending appeal of his conviction is governed by the Comprehensive Crime Control Act of 1984 which became effective for this purpose on October 12, 1984. The Comprehensive Crime Control Act significantly changes prior law governing this issue and its interpretation as applied to a case like this one, which is apparently a matter of first impression. Under the new law, essentially a judicial officer shall order that a person who has been found guilty and who has filed an appeal be detained unless the officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released. And I take it from the presentence report and my hearing of you at the oral argument that there is really not an issue about that portion of the law.

I take it that is really not an issue?

MR. SHERMAN: That's correct, Your Honor.

THE COURT: And what is at issue, of course, is the second portion that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in the reversal or an order for a new trial.

The legislative history of the Act indicates that the law shifts the prior presumption in favor of release to one favoring detention. Under prior law, release can be denied only if it appeared that the appeal was frivolous or taken for purposes of delay. Under the new act, the burden rests upon the defendant to establish not only that he will not flee or pose a danger to the safety of other persons in the community, but also that his appeal is not taken for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

I find, as government counsel very properly concedes that — and on my own reading of the presentence report, that the first part of the law is satisfied, that is, that Mr. Meloni is not likely to flee, nor is he likely to pose a danger to any other person in the community if released. Whether the defendant has satisified the requirements of the second part is the issue that I have thought about.

One interpretation of b(2) would require the judicial officer to deny release whenever the question being appealed is either insubstantial or unlikely to be resolved in the defendant's favor on appeal. However, the well-established rule of statutory construction is that a statute should be construed to give meaning to all of its words. Since every

question that is likely to result in reversal or a new trial is a substantial question, that reading of the law would make the substantiality test completely meaningless. In other words, if there are two requirements in the statute, I want to read the statute in a sensible way to give effect to both of them. And if one of the requirements is that it's likely to be reversed on appeal, then what sense is there to the other requirement of substantiality? Every case that is likely to be reversed on appeal involves a substantial question of law or fact. So, I think that is perhaps not a reading of the statute which makes sense of all the words, and I think my obligation is to try to read a statute sensibly and to read all the words of the statute sensibly.

In addition to that, the Draconian interpretation of the statute has been considered by other courts to raise constitutional concerns. Now, those other courts didn't resolve those constitutional concerns, and neither will I. But the opinion of the Court of Appeals for the District of Columbia in the *Brown* case considered an identical statute applicable by its terms, at least to the District of Columbia, and in construing that statute expressed very serious constitutional concerns.

I recognize there is no automatic right to bail pending appeal. On the other hand, the other side of that is that courts have said in their opinions by Justice Black and Justice Douglas indicating very clearly that the other side of that proposition is that judges should not deny such relief unless there are very strong reasons.

To deny bail pending appeal to persons convicted of crimes may, in certain instances, raise constitutional concerns because it would deprive a defendant of a meaningful

right of appeal which is granted by a statute, and there are commentators who have considered the issue. And one commentator, for example, puts it this way: one who suffers imprisonment after conviction and during the pendency of his appeal suffers the same injustice if his conviction is reversed and he is acquitted as one who is denied bail before trial and then acquitted. Bail is essential to make meaningful the right of appeal. Otherwise a sentence might be served before the appellate courts could set aside a conviction for infirmities at trial. An effective right of appeal would thus be lost.

Reading the statute in a way to deny bail would indeed in this case probably deprive Mr. Meloni of any meaningful review of a conviction in the court. Indeed, he would probably serve a sentence before the appeal was determined.

Now, the due process rights of the Constitution also guarantee that the defendant have an impartial tribunal deciding material issues. It's difficult for me to understand how an impartial judge would deny post-trial motions and then certify he is likely to be reversed on appeal. I can't conceive really how that is done. A statute which requires a court to make that determination before granting release on appeal does, to my mind, raise at least constitutional concerns. Reading the statute to require this kind of a determination, that is, the motions for new trial, for judgment of acquittal are denied by the court is likely to be reversed on appeal is just, in my mind, not a sensible interpretation of the statute. When a statute is susceptible of more than one construction, one presenting constitutional concerns that are serious, the other avoiding such questions, I think it's the duty of a court to choose the latter kind of reading.

As I interpret Section 3143(b)(2), a judge may release the defendant pending appeal where the defendant's appeal presents a substantial legal issue and where there is no legal impediment to reversal by stare decisis or otherwise. Not all defendants who raise substantial legal issues would be released under this interpretation. For example, there are many substantial legal issues that are decided by the Supreme Court of the United States in a divided opinion. And if the defendant raises one of those legal issues which has been decided adversely to him by the Supreme Court of the United States in a 5 - 4 opinion, it would be foolish to say that isn't a substantial legal issue. On the other hand, it's an issue that is not likely to result in reversal because, under the principle of stare decisis, that decision would be binding on me and the other judge who had to face the legal issue.

Another example would be if the defendant raises a substantial legal issue that has been decided contrary to his position in the court of appeals that has jurisdiction over the appeal. He would not be freed if it's likely, as perhaps Judge Pollak did in the bench opinion. Judge Pollak decided in the opinion which the government was kind enough to furnish me that the Supreme Court would likely decline to hear that issue. That's the end of it. Sure it's a substantial legal issue we will assume, but it's not likely to result in reversal. And, of course, the example which defense counsel pointed out to me at the oral argument of this matter: there is a substantial legal issue, but the defendant on other evidence is just guilty beyond a reasonable doubt or whatever. And the harmless error doctrine would prevent reversal would be another example of reading the statute in a sensible way to deny release pending appeal because all of the other legal issues is substan-

CERTIFICATE

I, Nancy O'Neill Reusing, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Official Court Reporter Date

tial. It is not likely to result in reversal.

Interpreting the statute to permit release pending appeal where the defendant raises a substantial legal issue in a context where there is no legal impediment which forecloses reversal is consistent with the rules of statutory construction. Both the words "substantial" and "likely to result in reversal or and order for a new trial" is given two meanings. Neither one is read out of the statute. In addition, this interpretation furthers Congressional intent of shifting the burden to the defendant to show that release is justified, and whether, of course, a legal or factual issue is substantial depends on the facts of each case.

I believe that the legal issue which Mr. Meloni has raised falls within that portion of the spectrum which satisfies the test of substantiality as I read the *Keller* case, although I denied the motions for a new trial and I really think there are sufficient circumstantial evidence to justify the conviction or I wouldn't have denied the motions for a new trial and for judgment of acquittal. The *Keller* case does raise a substantial legal question. And if another ccourt decided that *Keller* controls, of course, there is no legal impediment to reversal.

For those reasons, and after considering the able arguments of counsel last week, if I do, after hearing you, impose a term of imprisonment, Mr. Meloni's bail will be continued pending determination of his appeal. I apologize for doing this first, and I will hear you fully. But I thought it would just perhaps be more appropriate to dispose of this issue first, although perhaps in a more wooden way I wouldn't reach it until later. I just thought it would be better to do it now.

APPENDIX "G"

Gang was run by Provenzano, trial jury told

By Susan Finch
Staff Writer

West Bank businessman Joseph "Junior" Provenzano ran a sometimes haphazard crime gang that specialized in arson, extortion, prostitution, mail fraud and burglary, a prosecutor told a federal court jury Tuesday.

But attorney's for Provenzano, 49, of 5313 Fourth St., Marrero, and four of the six men on trial with him said the government's case is based on information from former Provenzano associates who are protecting themselves from prosecution for their own crimes.

Prosecutor Virginia B. Bitzer said the government will prove that, from 1979 to 1982, Provenzano and four of the defendants were "a group of people that got together for the purpose of committing serious, violent crimes."

Those being tried with Provenzano on the racketeering and conspiracy charges are:

Former Westwego surgeon Dr. Salvatore Canale, 63, now of Las Vegas, Nev.

Houma, La., lounge owner Herbert J. Thibodaux, 44.

Hubert "Huey" Crabtree, 43, 319 Avenue I, Marrero, owner of an oilfield tool rental company.

Offshore oil worker Harold P. Blanchard, 27, 1144 Scottsdale, Harvey.

A sixth man, Gretna dentist Dr. Natchez Morice, also was accused of being a part of the criminal enterprise. But

Morice, who underwent surgery last weekend, will be tried separately.

Two other men are on trial in the case only on mail fraud charges. They are deputy state fire marshal Joseph Manzella, 4508 Leo St., Marrero, and salesman Joseph Jimenez, 48, of 2101 Manhattan Blvd., Harvey.

Bitzer, a prosecutor with a federal organized crime strike force, detailed some of what she said were Provenzano schemes that didn't pan out.

She said, for example, the government will show that three Provenzano associates sent out to burn a car belonging to Canale's first wife torched the wrong vehicle.

Later, when Provenzano ordered two men to burglarize and burn a West Bank restaurant owned by Canale's estranged second wife, they committed the burglary but didn't go through with the arson because a country-and-western lounge next door was full of customers, she said.

One of the men told to burn the restaurant was John Rietzke, Bitzer said. Provenzano was convicted in January of hitting Rietzke with a shovel handle after Rietzke testified before a grand jury investigating Provenzano. Provenzano is seeking a new trial on that charge.

In one alleged extortion incident, Bitzer said, Provenzano beat up his associate Rondell "Tiny" Hulburt because Provenzano was unhappy about his share of a prostitute'e earnings.

"You will hear that argument as it is taking place,"

said Bitzer, referring to one of several tape recordings made by informants.

Provenzano's attorney Provino Mosca, however, told jurors that Hulburt started the fight, during which Provenzano hit him over the head with a chair and pointed a gun at Hulburt to frighten him.

Mosca said that afterward, as the two men walked out of the West Bank lounge where the fight had occurred, Hulburt apologized to Provenzano, saying, "I love you."

"What Tiny means by that is the kind of love a woman has for a man. Junior sensed this and wanted no part of it," said Mosca, who said the case involved " a lot of sensitive areas: homosexuality, bisexuality, rape and prostitution."

Mosca likened the case against Provenzano to George Orwell's novel "1984" saying it "involves overreaching authority. It gives us a warning about the future of our freedom."

Canale attorney Ralph Capitelli attacked the credibility of two key witnesses in the case — Hulburt and Robert John Toal, who had been described by Bitzer as Provenzano's former right-hand man.

Hulburt, he said, pleaded quilty to a charge of sexual battery in Plaquemines Parish while he was a government witness in the Provenzano investigation. Hulburt is serving 10 years in prison, Capitelli said.

He said Toal is not being prosecuted for state crimes he committed and was paid almost $30,000 to investigate

and testify against Provenzano.

Blanchard attorney Ed Castaing Jr. said Hulburt, Toal and Rietzke all had worked as pimps and shouldn't be believed. He said Rietzke was manipulated by Toal, and Toal wanted to get Blanchard in trouble because Blanchard had run away with Toal's first wife and child.

APPENDIX "H"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA

VERSUS

JOSEPH ROBERT PROVENZANO

CRIMINAL ACTION
NUMBER 84-103
SECTION M

TRANSCRIPT OF THE COURT'S QUESTIONING OF THREE JURORS PERTAINING TO AN ARTICLE IN THE NEWSPAPER, HELD IN OPEN COURT, WEDNESDAY, DECEMBER 5, 1984, DURING THE TRIAL IN THE ABOVE-MENTIONED CASE, BEFORE THE HONORABLE PETER BEER, UNITED STATES DISTRICT JUDGE.

REPORTED BY:
RHONDA J. BALLARD
OFFICIAL COURT REPORTER

PROCEEDINGS

* * * * *

MR. MOSCA: In connection — there was an article in

todays paper and I would ask the Court, I have a copy marked as Provenzano double A. The article makes reference to this trial. It goes deeper than that. It makes a reference to Mr. Provenzano's prior conviction. I would ask the court if it would respectfully consider asking the jurors if they read the newspaper, if anyone raises their hand, if you would take them individually and discuss it with them.

THE COURT: Yes, I'll deal with it this way. I think it's in order for you to make that request and I'll handle it this way. I am not going to ask if anybody has or hasn't, I am going to simply indicate to the jury if anybody has seen the newspaper article that they should disregard anything that is contained in it with resepect to any other events in Mr. Provenzano's life because they don't have anything whatsoever to do with the matter we are dealing with here. And that they should consistently disregard any reference to any other events, for the only thing that they are to adjudicate here is the guilt or innocence of any of the defendants here, in light of the evidence aduced with repect to this trial. And I am going to tell them that in the future they should disregard any public statement by the paper or on the tube or anything like that, that they should disregard it. I think paper has a right to print what they want to print. I'm not sure that it is really all that possible to tell the jury they can't read anything or watch the tube or inadvertantly come across information. I think it's far more useful to the administration of justice, in fairness to the defendants and the whole process of fair jury proceedings to tell them to disregard it rather than try to have them cut off a part of their lives. I will do that, consistent with what I said.

MR. MOSCA: Your Honor, in connection with your

decision, it seems reasonable that we have four alternates. It seems reasonable that if one of the jurors or one of the alternates has read about his prior conviction that is a step beyond just reading the article and disregarding it. If there is anyway you can edit that out or confront the jury about it and see if it's tainted them anyway, because that seems to me to be a little bit more severe of a problem than just reading the article and disregarding it.

THE COURT: Well, okay. I am not going to do it that way I am going to do it the way I indicated and proceed on that basis. I'll note your statement as to how you believe it should have been done.

MR. MOSCA: Thank you. Respectfully note my objection.

MR. FANNING: We had a conversation previously about this and I think the other attorneys thought we were going to make a motion just now, Judge.

THE COURT: Okay if you want to distill this into a motion for mistrial, make the motion. I'll deal it right now.

I am going to deal with the jury the way I indicated. If you think that forms a basis for moving for a mistrial, go ahead make the motion.

MR. FANNING: I am concerned about making our record. We would urge the court for a mistrial due to the substantial danger that some of the jurors may have read the article in the metro section in the paper. It makes reference to Mr. Provenzano's previous conviction and call to the court's attention that had the government made

mention of such a conviction during it's opening statement for example, there would have been no way to cure that. We think there is no way to cure it at this point by giving any cautionary instruction to the jury.

THE COURT: Does the government want to be heard from on that?

MS. BITZER: No, your Honor.

THE COURT: Any alternative suggestion to that which I intend to follow?

MS. BITZER: I think cautionary instructions should solve the problem. There may be other articles in the future.

THE COURT: That is the way I intend to deal with it. The record is clear. The Government said what they want to say, I told you what I want to do. Everybody has their ducks in a row.

MR. FANNING: The other defendants want to be included on behalf of all parties.

THE COURT: I don't know exactly what specific grounds, but I will note that they have made the motion as well and has been denied.

MR. HAND: Does that mean the court would like us to articulate on behalf of each client?

THE COURT: I don't find it necessary. You can save that for the court of appeal.

(Whereupon, the jury enters the courtroom.)

THE COURT: It looks like, it is hard for me to tell what has happened to Mr. Woods. I waited essentially an hour for him to show up. Apparently there was a call early this morning to the jury section by Mr. Woods, at which time, apparently it was indicated he would be here by noon. But, we were an hour into the time that we had indicated we would start up again. And I have just found it necessary to go ahead. I don't feel like I could impose on the other members of the jury, the lawyers, the defendants, the government, the witnesses et cetera. And so that nobody will bear the responsibility except me and the record will be clear that there isn't anyone else making decision. I just made the decision to go ahead now that an hour has passed from the time we were supposed to start. And reconstitute the jury with the first alternate becoming a member of the panel. If anybody has some objection, wants to note it, Ill permit you to do so when we break. For whatever purpose or reason you may wish to note any objection. I am perfectly willing to make it clear on the record I am just doing it on my own responsibility. I don't see any alternative but to go ahead. If anyone wants to specifically voice an objection at this time, I am willing for them to do so. I'll permit you to note any objection during the afternoon break.

The first thing I want to do is clear up a couple of points as far as what I guess you call good housekeeping is concerned, Ladies and Gentlemen of the jury. One of the great things about this country, I suppose, is the fact that the court process is one that is open to the public. The public certainly includes people from the press, the radio, television, newspaper, et cetera. And thus, in the course of

this trial as has now been brought to my attention, some articles may, from time to time, appear in the newspaper, you may even notice yourself some of them have reference to the fact that this matter is in trial, something on the radio, something in the paper. It was called to my attention, though I didn't see it myself, there was an article in this morning's Times Picayune about this trial. Which is quite in order. The press has a perfect right to be present in the courtroom, just like any other citizen. However, the newspaper article makes reference with respect to Mr. Provenzano, of another case that had been before this court. And if any of you all did, by chance, see the article or read it, I want to say to you that any reference to any other proceedings is so totally irrelevent and immaterial to what we are dealing with here. And I want to instruct you in the strongest possible terms to disregard any reference to any other event or events as they have to do either with Mr. Provenzano, or any other defendant in the case. The obvious purpose of my instructions to you on that point is clear, the only thing that this jury is concerned with is a determination of the guilt or innocence of the defendants before this court, with respect to these charges, in these proceedings, at this time. And it would have been quite in order for defense counsel to object if anyone in the proceedings sought to make reference to any other event or events involving any of these defendants that is not material to these proceedings. It isn't before us. and I direct you in the strongest possible way to disregard any reference wherever it may be, in the newspaper, television, radio, et cetera, with respect to any other alleged, or proposed, or contended activities on the part of any of these defendants in every respect. Because that is not what we're dealing with here. What we're dealing with here is the charge that the grand jury returned that I read to you

carefully yesterday and I noticed that you all listened to carefully yesterday. And that is all. And Basically, what the jury has to decide in this case, is whether any of these defendants are guilty of any of these charges, the ones that we discussed yesterday. And nothing else. Indeed, the jury doesn't even have to be concerned in any respect with regard to any dealing with that finding if there is, whatever the finding is. The court will deal with that finding itself. So, what you all have got to concentrate on and I know you will, is simply the question of guilt of innocence of these defendants as they are involved with the charges that have been brought against them by The United States. That is all. In this court proceeding, before us here in this courtroom. And I know that you will do that. I can sense in my eye contact with you and just my own appraisal of your togetherness as far as operating as a jury is concerned, that you're going to follow my request and my direction that you deal with it on that basis. And I know that you will. Let me say to you the best way of avoiding any consideration of what may be carried in the press when, I say the press, I mean the whole area of press activities, radio, television, newspaper, magazines, whatever. Try to avoid concerning yourself with any articles or what not. Because all it could possibly be in so far as what is going on here is concerned, is report of those events which you all are more privy to than anybody. You all know better than anybody what is going on here. Really, the best way to avoid any possibilities of having anything that should not be considered by you in anyway called to your attentions is just to flip it off if something comes on or disregard it, not read it, if it shows up in the paper. I don't mean to demean those sources of information. I just mean that that is probably the fairest thing you can do in the circumstances. But most important, of course, is to follow my very strong admoni-

tion to you not to in any way be effected by, or consider, or even take into account other events involving any of these defendants as they have to do with other contentions, other findings in other proceedings whatsoever. That is the only way to live up to your oath, which is that you will give the defendants a fair and impartial trial and, of course, the government, the same thing. And consistent with that fairness and impartiality is that you regard only what you hear and perceive here in this courtroom in these proceedings. And I know you will do that. Okay, let's go right ahead, then call your next witness.

MR. MOORE: Could we have a sidebar conference, if the court please?

(Whereupon a bench conference was held outside the hearing of the jury on the record.)

MR. MOORE: Your Honor, what concerns the government at this time is if any of the jurors could have read the article. We suggest that the court should probably propound the question as to whether or not anyone of them have read the article. Because the court kind of mentioned to them there was another case. And we think that needs to be clarified at this time, that if anyone has, in fact, read the article. That the court should probably inquire whether or not that would effect them in so far as any judgement of this case.

MR. MOSCA: This basically is what I asked for initially, and at this time I would like to ask that if you so deem it appropriate you would ask the juror to raise their hand and take them individually so we don't taint the whole jury if that is ameanable to you.

THE COURT: I'll do that.

(Whereupon, the discussion at the bench was concluded.)

THE COURT: Kind of along the lines of the article in the paper, let me ask if any of you did, in fact, read that article. In the Times Picayune, this morning? Let me just ask your name, please.

JUROR, BAILY: Valerie Bailey.

JUROR, VOLINTINE: Donna Volintine.

JUROR, MEIDERA: Jean Meidera.

THE COURT: Okay. I think perhaps the easiest way to deal with this would be to ask — I know this is a slight inconvenience to you all — let me ask that the jury step out for just a moment and Miss Bailey, would you remain for just a second after the jury steps out.

(Whereupon the jury exited the courtroom.)

THE COURT: I'm going to ask you some questions. I want to check with you to satisfactory myself of a couple of points. Did you recall if you noticed in the article, the article made reference to another trial, another conviction with respect to Mr. Provenzano.

JUROR, BAILEY: I don't remember.

THE COURT: You don't remember, If indeed it did, and you happened to have read it, would that in anyway af-

fect your ability to fairly and impartially hear and decide this case?

JUROR, BAILEY: No, It won't.

THE COURT: Any other questions.

MR. FANNING: I'd like to ask the juror if she discussed the article with anyone else, including any of the jury.

THE COURT: Did you discuss that article with any other members of the jury.

JUROR, BAILEY: No, I did not.

THE COURT: Thank you, Miss Bailey, would you ask Miss Volintine if she would step in a minute.

(Whereupon, Juror, Bailey, exited the courtroom.)

MR. CAPITELLI: Before the next juror comes in, I would like to ask the court not to reference the point in the article. I think that has an effect on all the people involved.

THE COURT: I don't understand what you mean.

MR. CAPITELLI: I withdraw it.

MS. BITZER: We agree with that. I understand what he is saying, that the court would not pinpoint the specific case. More particularly, whether or not there was a conviction, as a matter of fact. Just whether or not they read it, if it would effect it would have on them.

THE COURT: I am going to try to do this the way all of you want to. I don't have the forum in prospective, as much as I do the necessity of a fair trial. And as far as I am concerned, the verbage that somehow, apparently effects everyones thinking, because the Fifth Circuit pronounces some existing attitude of the manner these things have to be addressed, doesn't concern me as much as being sure I satisfactory myself as a United States District Judge these people are going to have a fair trial at the hands of this jury, than some rote adherance to some specific verbage announced by some panel of the Court of Appeal. Go ahead call the next juror. (Whereupon, Juror, Volintine entered the courtroom.)

THE COURT: Consistent with your response to the court, with respect to having read the article that appeared in the Times Picayune this morning, did you read the article in its entirety.

JUROR, VOLINTINE: No, I just glanced through it.

THE COURT: Let me simply ask you this: Would the discussion of the article, what is included in the article, in anyway effect your ability to fairly and impartially hear and decide the issues in this case.

JUROR, VOLINTINE: No sir. The few facts that I did see were facts that I had heard here yesterday. And my thought was that whoever wrote that was pretty accurate. And I put it aside and had my coffee I learned from yesterday that I am not going to make my mind up until I heard everything.

THE COURT: Couldn't do any better than that.

THE COURT: Anybody have any other questions.

Have you discussed the article at all with any of the other jurors.

JUROR, VOLINTINE: Just that I glanced at article, it was in the paper.

(Whereupon Juror, Volintine exited the courtroom and Juror, Medare entered the courtroom.)

THE COURT: Miss Medare. I want to reference you to the fact that you had noticed the article in the paper this morning, the Times Picayune newspaper, this morning. Did you read it in its entirety.

JUROR, MEDARE: I really just glanced at it.

THE COURT: Would any of the matters that are contained in it, that you noticed, in any way effect your ability to fairly and impartially here and decide the issues in the case?

JUROR, MEDARE: No, it would not.

THE COURT: Do you remember Miss Medare, discussing it with any of the other members of the jury?

JUROR, MEDARE: No, I didn't discuss it with anyone.

THE COURT: Remain if you will.

MR. MOSCA: I have a motion after the close of the day.

THE COURT: Okay. Let's reserve it until then.

* * * * * * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/
RHONDA J. BALLARD
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SECTION M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

UNITED STATES OF AMERICA

VERSUS

JOSEPH ROBERT PROVENZANO, ET AL.

CRIMINAL ACTION
NUMBER 84-103
SECTION M

TRANSCRIPT OF THE DISMISSAL OF JUROR, BAILEY, DURING THE TRIAL OF THE MATTER, BEFORE THE HONORABLE PETER BEER, UNITED STATES DISTRICT JUDGE, THURSDAY, DECEMBER 6, 1984.

REPORTED BY:
RHONDA J. BALLARD
OFFICIAL COURT REPORTER

PROCEEDINGS

(DISMISSAL OF JUROR, BAILEY)
THURSDAY, DECEMBER 6, 1984

* * * * *

MR. MOSCA: On behalf of Mr. Provenzano, this motion is made in connection with yesterday's proceedings. And we would just ask the court to consider if it's going to replace one of the jurors that it consider just replacing the jurors who read the articles. We have enough alternates, it seems to me, that that would —

THE COURT: Although it is perfectly obvious it had no effect on them whatsoever, as is the case with Mrs. Bailey, I want to say on the record, as far as this whole proceeding is concerned, I have absolutely doubt that the proceeding that the court followed with respect to Mrs. Bailey and the other two jurors is entirely in order, it was perfectly clear to me, absolutely categorically clear on the face of the discussion with Miss Bailey, there was absolutely no basis whatsoever for her to be excused. It was postively

clear to me that she had not, in anyway, been influenced by the article. Indeed, it was absolutely clear that that was not the case, that it had no effect on her whatsoever, and yet I am now, confronted with a request by the U. S. Attorney's office to remove Mrs. Bailey from the jury. Now, because of the apparent concern on the part of the U. S. Attorneys office with respect to this one particular juror or actually, if the truth be known, the concern from the U. S. Attorneys office that some appellate panel might take umberage at the process that the court instituted as a United States District Judge concerned not with the rote business of verbage but with the actual determination of whether or not there had been any possibility of any prejudge whatsoever or any misgiving or any hesitancy whatsoever, being absolutely sure that that was not the case and making that statement on the record, and to the United States Attorneys office, nevertheless, the court is confronted by a request from the U.S. Attorneys office to replace Miss Bailey in accordance with that categoric request on the part of the U.S. Attorneys office, which I essentially, an in disagreement with, but, nevertheless, in an effort to make absolutely certain that we are not wasting everybody's time here and taking into account the remote possibility that in the instance that they have underlined and show all of this concern about could possibly be some basis for dealing with this case in some basis, even after the court made it absolutely clear as an officer of the United States, that I am convinced there is no basis whatsoever to discharge Miss Bailey. I am going to do that to simply go on with the trial of this matter and get this matter resolved as far as the government is concerned, as far as the defendants are concerned, as far as the jury is concerned and everybody else involved is concerned. I'm not going to discharge any of the other two persons who

say that they at least took a look at the article because, as far as I am concerned, that is even more ridiculous and I will not proceed in accordance with your request.

MR. MOSCA: Respectfully note our objection and urge the motion for mistrial.

MR. CAPITELLI: For everyone, I would object to the court's proceeding here. Think it taints the remaining defendants, and move for a mistrial on behalf of Doctor Canale.

THE COURT: It's denied:

(Whereupon juror, Bailey, entered the courtroom.)

THE COURT: Miss Bailey yesterday I asked a couple of questions about the article in the newspaper. And concerning certain aspects of the case as it was mentioned in the newspaper. Did you in anyway discuss my questioning of you with the other members of the jury?

JUROR, BAILEY: Well, they asked me what you said. I told them that you asked about the paper.

THE COURT: That's all, that I asked about the article in the paper?

JUROR, BAILEY: In the paper.

THE COURT: That was the extent of your response to them?

JUROR, BAILEY: Yes, that was it.

THE COURT: Anybody have any questions they want to put to this juror with respect to that.

MR. CAPITELLI: Did you, as far as that discussion is concerned, go into any particular detail about the article, in particular, what was in the article?

JUROR, BAILEY: No. No more than when someone mentioned that the article was in the paper and most of them said they didn't see it, so I said I saw it, another lady said she saw it, that was it. Nobody discussed what went on in the paper.

MR. CAPITELLI: Thank you.

MR. HAND: I have one question. Did you, after you had spoken with the judge when the judge brought you in by yourself and asked you some questions, did you discuss with those jurors any of the questions which the court had asked you.

JUROR, BAILEY: No. What he asked me. And I said about the article.

MR. HAND: What it was about, that it was the article in the paper.

THE COURT: Okay Miss Bailey. Because of some technical problems that certain of the attorneys think are existent in the matter with respect to the procedures that were followed in connection with the article, I am obliged to excuse you. So I am going to send you home. And thank you very much for your service.

THE COURT: Call the jury and replace Miss Bailey with the second alternate.

(Whereupon the jury entered the courtroom.)

THE COURT: Let me say to the jury that the court, in an effort to be responsive to certain contentions by various counsel in connection with the manner in which the court dealt with, the people who had indicated any reading of the article that I mentioned to all of you all, has found it necessary, in the circumstances, to excuse Miss Bailey. Certainly it isn't any reflection on Miss Bailey. If anything, it has to do with the handling of the interrogation of Miss Bailey by me. So, the fact that she has been excused should not be construed by any of you in anyway with repect to the trial of this matter at all. Quite the contrary. Miss Bailey has been cooperative and interested and an excellent juror. Let's proceed with the witness that was on the stand when we broke.

* * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ _____
RHONDA J. BALLARD
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SECTION M

APPENDIX "I"

IN THE UNTIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

UNITED STATES OF AMERICA

V.

BIAGIO CIRRINCIONE and
TOM CIRRINCIONE, et al.

No. 82 CR 778

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This case is before the court on the motions for release on bond pending appeal of defendants Biagio Cirrincione and Tom Cirrincione. On August 8, 1984, after a jury trial, defendants were found guilty of violations of federal law in connection with the bombing of certain restaurants. On October 18, 1984, the court denied both defendants' motions for new trial and for judgment of acquittal, and sentenced them to periods of incarceration. Both have filed Notices of Appeal, and now move the court for release on bond pending appeal. Defendants contend that they meet the standards for release under 18 U.S.C.§3143 of the Bail Reform Act of 1984. Alternatively, defendants have argued that application of the Bail Reform Act to them would violate the ex post facto clause, Article I, §9 of the Constitution.

Standards Governing Bond Pending Appeal

On October 12, 1984, the President signed into law the continuing appropriations resolution, Public Law No. 98-473, 98 Stat. 1837. Title II of that Public Law is the Comprehensive Crime Control Act of 1984, Chapter I of which contains substantial revisions of the law governing bond pending appeal. *See* Bail Reform Act of 1984, §§202-210 (codified at 18 U.S.C. §§3141-3150, 3041-3043, 3062) (the "Act"). As the Act contains no effective date, it is clear that it became effective on October 12, 1984, the date of enactment. *United States v. Gavrilonic,* 551 F.2d 1099, 1103 (8th Cir. 1977) (citing *Arnold v. United States,* 13 U.S. (9 Cranch) 103,119 (1815)). *See* U.S.Department of Justice, *Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress,* at 27 (Dec. 1984).

The new standards governing bond pending appeal provide that in a case such as this, bond shall be denied unless the court finds:

> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released. . .; and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

18 U.S.C.§3143(b). This substantially changes the standards governing bond pending appeal. Before the Act became effective, bond pending appeal could be denied in this case only if "a risk of flight or danger [to any other person or to the community] is believed to exist, or if it ap-

pears that an appeal is frivolous or taken for delay . . ." 18 U.S.C.§3148, *repealed by* Bail Reform Act of 1984, §203(a). In addition, while the burden of establishing that the defendant will not flee or pose a danger to another person or the community rested with the defendant, Fed.R.App.P. 9(c), *amended by* Bail Reform Act of 1984, §210, the burden of establishing that the appeal was frivolous or taken for delay rested with the government. *Id.* at advisory committee note.

The new standards for bond pending appeal substantially increase the Cirrinciones' burden on this motion. First, amended Appellate Rule 9(c) provides that the defendants carry the burden of establishing, by clear and convincing evidence, both elements of §3143(b). Second, §3143(b)(2) requires them to show that their appeal raises a "substantial question of law or fact likely to result in reversal." This is a more stringent test than the previous "frivolous" standard. The legislative history makes clear that the change in wording represents an intentional change in the standard. A Senate Report gives this description of a predecessor to §3143(b):

> Subsection (b) deals with release after sentence of a defendant who has filed an appeal or a petition for a writ of certiorari. Such a person is . . . to be detained unless the judicial officer finds by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. In addition, the court must affirmatively find that the appeal is not taken for the purpose of delay and that it raises a substantial question of law or fact likely to result in reversal or an order for a new trial. This is a further restriction on post-conviction release. Under the current 18 U.S.C.§1348,

> release can be denied if it appears that the appeal is frivolous or taken for delay. The change in subsection(b) requires an affirmative finding tnat the chance of reversal is substantial. This gives recognition to the basic principle that a conviction is presumed to be correct.

S. Rep. No. 97-317, at 57, 97th Cong., 2d Sess. (1982) (concerning S. 1554); *see also* S.Rep. No. 98-147, at 52-54, 98th Cong., 1st Sess. (1983) (concerning S. 215). The United States Department of Justice, quoting the Senate Report, has also interpreted this change as requiring "[a]n affirmative finding . . . that the chance for a reversal is substantial." U.S. Department of Justice, *Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress,* at 10.

The defendants argue that the Act requires nothing more than a nonfrivolous issue on appeal which, if successful, would result in a reversal or an order for a new trial. The Act requires more. It requires either a likelihood — that is something more than a 50% chance — of reversal, or a substantial chance of reversal, or at least a substantial question of law or fact which has not been foreclosed on appeal, for example, by a specific Seventh Circuit precedent which is unlikely to be changed by the Court of Appeals or considered by the Supreme Court.

In their post-trial motions, the defendants raised what the court has called a "serious" issue based on the fact that the defendants were represented by the same lawyer. Dual representation generally raises a serious legal question. However, for the reasons stated in the court's opinion of October 18, 1984 denying the post-trial motions, the attorney's conflict of interest was knowingly waived by the

defendants. The issue is not substantial and the chance for reversal or a new trial order is neither likely nor substantial. Since the defendants cannot succeed under any of these possible standards, the court declines to define more specifically the requirements of the Act.

The government has also urged that Biagio Cirrincione has not demonstrated by clear and convincing evidence that he is not likely to flee. The Court has reserved ruling on this issue pending receipt of further information from the parties.

The court is convinced, and the government does not disagree, that Tom Cirrincione neither poses a danger to the community nor a risk of flight. The sole reason for denying Tom Cirrincione's motion would be his failure to demonstrate a likelihood or a substantial chance of reversal on appeal. Hence, in his case, application of the Bail Reform Act of 1984 results in incarceration pending appeal where he would otherwise be released. This requires the court to examine the argument that application of the new provisions concening bond pending appeal in this case violates the federal ex post facto clause.

Ex Post Facto Clause

Article I, §9 of the United States Constitution prohibits Congress from passing any "ex post facto" law. This clause was adopted to protect an individual's right to fair notice when the government changes "that conduct which will give rise to criminal penalties," Marks v. United States, 430 U.S. 188, 191 (1977); or "increases punishment beyond what was prescribed when the crime was committed," *Weaver v Graham*, 450 U.S. 24, 30 (1981); or

"deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio,* 269 U.S. 167, 169-70 (1925).

In the most recent ex post facto case decided by the Supreme Court, *Weaver v. Graham,* 450 U.S. at 29 (1981), the Court noted that two critical elements must be present for a criminal or penal law to be held ex post facto: it must apply to criminal acts occuring before its enactment into law, and it must disadvantage the offender affected by it. The Bail Reform Act of 1984 facially fits these criteria., First, the Act retrospectively affects all defendants whose crimes occurred before the effective date of the Act, October 12, 1984. Secondly, the Act severely limits the availability of bond pending appeal and is disadvantageous to defendants who routinely seek to delay commencement of their sentences by obtaining release on bail pending appeal.

The Supreme Court has repeatedly recognized, however, that no ex post facto violation occurs by retrospective operation of a purely procedural change in the law even though a particular criminal defendant is thereby disadvantaged. In *Dobbert v. Florida,* 432 U.S. 282 (1977), the Court upheld retroactive application of a statute reversing the roles of judge and jury in determining a sentence of death, despite the fact that the new statute allowed the judge to disregard a jury recommendation of mercy which would have been binding under previous law. In *Beazell v. Ohio,* 269 U.S. 167 (1925), the Court upheld retroactive application of a statutory amendment eliminating an earlier prohibition against joint trials, despite the contentions of the defendants in those cases that they were thereby prejudiced. Finally, in *Hopt v.*

Utah, 110 U.S. 574 (1884), the Court found no ex post facto problem in retrospective operation of a statute allowing convicted felons to serve as competent witnesses. In all these cases, the Court reasoned that purely procedural changes in the law are not ex post facto unless these changes make criminal a previously innocent act, change the proof necessary to convict, or increase the punishment for a particular crime. See, e.q., Hopt., 110 U.S. at 589.

In other cases, however, the Supreme Court has recognized that procedural changes in the criminal law may so affect substantial rights as to fall within the ex post facto prohibition. In *Kring v. Missouri*, 107 U.S. 221 (1882), the Court invalidated retrospective application of a state constitutional amendment allowing a defendant to be tried for first-degree murder after a previous conviction for second-degree murder had been reversed on appeal. Under the law in effect at the time the offense was committed, the conviction for second-degree murder would have amounted to an acquittal of the first-degree murder charge regardless of events on appeal. The Court held that the defendant's right to plead the second-degree murder conviction as a bar to more serious charges could not be taken away retrospectively.

Similarly, in *Thompson v. Utah*, 170 U.S. 343 (1898)), the Court held that a Utah constitutional provision allowing trial by a jury of eight in non-capital cases was ex post facto in application to crimes committed within its limits while Utah was still a federal territory, since Utah was at that time subject to the then constitutional requirement that juries in felony cases be composed of twelve persons. The Court recognized that matters of procedure generally do not trigger ex post facto concerns but reasoned that the

decrease in the number of jurors necessary to convict "materially impair[ed] the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed." *Id.* at 351. Subsequent cases, however, have limited the rationale of *Thompson* to changes in *constitutional* procedural rights by stating that a defendant is disadvantaged only when a procedural *right* is taken away, not when a change in procedure advantages the prosecution. *See* Note, *Ex Post Facto Limitations on Legislative Power,* 73 Mich.L.Rev. 1491, 1510-11 (1975).

Defendants have argued that application of the Bail Reform Act to them would both increase punishment and take away substantial rights in violation of the ex post facto clause. The latter argument responds to the government's contention that the Act is "merely procedural" and derives from the following passage in *Beazell v. Ohio,* 269 U.S. 167,171 (1925):

> Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.

In no case, however, has a procedural change in the law been held to have ex post facto implications absent an increase in punishment or a change in the quantity and degree necessary to establish a defendant's guilt. Thus, the

"substantial rights" language of *Beazell* is just another way of stating that alterations in what constitutes criminal conduct or the limits of punishment for a recognized crime will not escape ex post facto scrutiny merely because enacted in "a seemingly procedural form." *Weaver v. Graham,* 450 U.S. 24, 29 n.12 (1981).

Since the Bail Reform Act does not criminalize conduct that was innocent when done or otherwise affect the question of defendant's guilt or innocence, it is clear that the Act is ex post facto only if the denial of release on bail pending appeal amounts to a retroactive enhancement of punishment, i.e., if accelerating the time when imprisonment commences for defendants who choose to appeal and could establish eligibility for post-conviction release under the old but not the new statute constitutes an "increase" in punishment.

Defendants have cited several state law cases in support of this contention, but none of them is particularly instructive. The first, *Parker v. State,* 667 P.2d 1272 (Alaska Ct.App. 1983), relied on a state statute prohibiting retrospective application of statutes in order to avoid reaching the federal question. In *Ellis v. State,* 544 S.W.2d 908 (Tenn. Ct. Crim. App. 1976), the court held that a statute denying bail pending appeal had "ex post facto" overtones but cited no cases nor discussed any reasons for its holding. In *Greene v. State,* 238 So.2d 296 (Fla. 1970), the Florida Supreme Court held that retroactive application of a statute denying post-conviction bail to repeat offenders was ex post facto as to defendants both of whose felonies were committed before the statute's effective date, but cited no federal case law in support of its conclusion. *Greene* was then followed in *Cunningham v. State,* 423

So.2d 580 (Fla. Dist. Ct. App. 1982), in which the appellate court, citing *Weaver v. Graham*, 450 U.S. 24 (1981), concluded without explanation that a retrospective restriction on eligibility for release on appeal bond is fully analogous to a penal provision "more onerous than the law in effect on the date of the offense." 423 So.2d at 581.

Cases which have upheld the retroactive application of bail reform statutes are somewhat more lucid, but not necessarily more persuasive. In *Spitznas v. State*, 648 P.2d 1271 (Okla. Ct. Crim. App. 1982), the court conclusorily held that denial of bail while appeal is pending is neither an increase in punishment nor an "alteration of . . . substantive rights on appeal" which would bring the ex post facto clause into play. In *State ex rel. Dorton v. Circuit Court*, 274 Ind. 373, 412 N.E.2d 72 (1980), the Indiana Supreme Court noted that the right to bail pending appeal does not affect a criminal defendant's "substantial rights concerning proof of the offense or the time to be served upon conviction therefor." *Id.* at 74. The *Dorton* court also relied on the ground that the "opportunity for release on appeal bond is a status which must be determined at the time a convicted person seeks such relief" and therefore does not "vest" at the time an offense is committed. *Id.* at 75. To the extent that *Dorton* relies on a "vested rights" analysis, however, its reasoning is without merit. *See Weaver*, 450 U.S. at 30 ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the *ex post facto* prohibition . . . ").

Only two federal cases to this court's knowledge have addressed the precise issue before the court. In *United States v. Davis*, 82 CR 564-CSH, Slip op. (S.D.N.Y. Nov. 20, 1984) (available on WESTLAW), Judge Charles Haight

rejected the defendant's ex post facto objections and granted a government motion to revoke bail pending appeal based on the intervening passage of the Bail Reform Act. Relying on *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice), Judge Haight held that the Bail Reform Act's new standards for obtaining post-conviction bail constituted "modes of procedure" which do not affect a defendant's "substantive personal rights, in contesting his guilt or pressing an appeal." Slip op. at 35. The court did not address whether the new standards increase punishment in any way. In *United States v. Dante Gill*, No. Crim. 84-87 (W.D.Pa. 1984), Judge Gustav Diamond reached the opposite conclusion. In a bench opinion, Judge Diamond found that the provisions restricting bail pending appeal constituted "a substantive and substantial change in the law" which was ex post facto as to defendants whose crimes were committed prior to the statute's enactment. Judge Diamond also found the shift of the burden of proof regarding entitlement to bail to be ex post facto.[1]

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[1] This ruling was brought to the court's attention in a Supplemental Memorandum filed by defendants with this court on January 15, 1985. In that memorandum, defendants also raise new constitutional issues for the first time regarding the due process clause and the eighth amendment. Despite defendant's effort to characterize these arguments as having been raised previously, the court notes that defendants' earlier objections were raised as a matter of statutory construction, and not as constitutional arguments. Since defendants were given leave to file supplemental authority, not to introduce new legal theories, the court declines to entertain these arguments. In light of this court's disposition of the ex post facto issue, defendants are hardly prejudiced by this decision.

Defendants initially argue that the standards for release pending appeal mandated by the new Act are "more onerous" than the standards in effect at the time they committed their crimes and therefore cannot be applied retroactively. This conclusion is not so apparent as defendants maintain. While the Supreme Court has held retrospective restrictions on parole eligibility to be ex post facto, it has done so only where operation of the new restriction effectively lengthened the term of incarceration to which defendants were subject at the time they committed their crimes. In *Weaver v. Graham*, 450 U.S.24 (1981), for example, the Supreme Court held that changes in Florida's statutory formula for computing "gain time" credits could not apply retrospectively. The Court reasoned that, whether or not "gain-time" credits had vested at the time of a prisoner's sentencing, the prospect for such credit" in fact is one determinant" of the length of a prisoner's incarceration so as to alter the "quantum of punishment" and thereby implicate ex post facto concerns. Id. at 30-33.

While the Supreme Court has on at least one occasion found alterations in punitive conditions outside the sentence to be ex post facto, *see, e.g., In re Medley*, 134 U.S. 169 (1890) (statute requiring solitary confinement prior to execution for all prisoners sentenced to death), the rational of *Weaver* is tied to changes in the actual term of incarceration. Under the Bail Reform Act, defendants' period of incarceration remains the same as it was before. Thus, there is no change in the "quantum" of punishment, and it is unclear at best whether *Weaver* applies.

Defendants seek to escape this conclusion by pointing to the effect that detention pending appeal will have on

their ability to obtain a reduction in sentence under Fed.R.Cr.P. 35(b). Generally, Rule 35(b) motions to reduce may be made any time after sentencing up to 120 days after affirmance on appeal. A defendant who has been released pending appeal and evidenced good behavior during that time may be able to demonstrate the changed circumstances which would convince a court to reduce an earlier sentence, whereas a defendant who has been incarcerated throughout the same period might not be able to make such a showing.

The court recognizes that application of the Bail Reform Act significantly changes the calculus behind filing a Rule 35(b) motion and that district courts sometimes reduce sentences, or completely eliminate any period of incarceration, if during the appeal period the defendant's circumstances have changed or he has demonstrated good behavior or other positive qualities. The court also recognizes that defendants' Rule 35(b) rights cannot be disregarded simply because they have not vested. *See, supra.* page 11. Nonetheless, defendants still have the right to make a Rule 35(b) motion for reduction of sentence within 120 days of sentencing and then again within 120 days of affirmance on appeal. Any shift in their actual ability to obtain a sentence reduction is speculative. Any effect of the Bail Reform Act on the actual length of incarceration is therefore too remote to justify the kind of reliance on criminal penalties with which the ex post facto clause is concerned.

The government has argued that the Bail Reform Act does not increase punishment by analogy to case law upholding retroactive application of the pretrial detention provisions of the Bail Reform Act and similar legislation.

United States v. Hazzard, 84 CR 771-1, Slip op. (N.D. Ill. Dec. 11, 1984); *DeVeau v. United States*, 454 A.2d 1308, 1314 (D.C. Ct. App. 1982), *cert. denied*, 460 U.S. 1087 (1983). In *Hazzard*, Judge William T. Hart reasoned that pretrial detention under the new Act is imposed on a defendant not for having committed criminal acts, but because of the defendant's status as an arrestee whose pretrial release presents a threat to community safety which no conditions on release can reasonably prevent. Slip op. at 26-27. Judge Hart therefore concluded that the Act's pretrial detention provisions are regulatory rather than punitive. Judge Hart also concluded that these provisions are not retrospective since the eligibility for release on bail is determined according to present status and not acts occurring before the passage of the statute. *Id.* Judge Hart then likened the Bail Reform Act to habitual offender statutes and legislation prohibiting preciously convicted felons from undertaking certain activities, both of which have withstood ex post facto scrutiny. Slip op. at 27-28. *See DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (law prohibiting previously convicted felons from participating in waterfront labor unions not ex post facto increase in punishment); *McDonald v. Massachusetts*, 180 U.S. 311 (1901) (laws creating aggravated penalties for recidivist criminal activity not ex post facto even though predicate offense predates statute); *United States v. Sutton*, 521 F.2d 1385, 1390-91 (7th Cir. 1975) (Congress constitutionally allowed to restrict criminals whose felonies occurred in the past from receiving firearms).

To the extent that the post-conviction bail provision of the new Act is regulatory and not punitive, it necessarily falls outside the prohibitions of the ex post facto clause:

> The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction comes about as a relevant incident to a regulation of a present situation . . .

DeVeau v. Braisted, 363 U.S. 144, 160 (1960). However, unlike the pretrial detention provisions which are concerned solely with safety of the community, the post-conviction bail restrictions are not unrelated to punishment nor merely incidental to regulation of a present situation. In the legislative history accompanying §3143, Congress expressed the notion that swifter punishment is a greater deterrent to criminal conduct: "release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where an appeal of the conviction may drag on for many months or even years." S. Rep. No. 98-225, at 26, 98th Cong., 2d Sess. (1984); S. Rep. No. 98-147, at 562, 98th Cong., 1st Sess. (1983); S. Rep. No. 97-317, at 56, 97th Cong., 2d Sess. (1982). Congress therefore specified that the former presumption in favor of bail pending appeal was to be eliminated, and that defendants must establish a substantial change or likelihood of reversal before post-conviction release pending appeal will be ordered.

By viewing the restrictions on release pending appeal to be a deterrent to crime, Congress must have concluded that a sentence which commences immediately upon conviction is somehow more severe than a sentence which com-

mences only after appeal. Certainly, a sentence which commences before, rather than after, appeal, is more certain to be served. For example, the defendant may die during the interim period. Not all procedural changes increasing the certainty of conviction, however, will be ex post facto when applied to prior criminal acts. *See, e.g., United States ex rel. Massarella v. Elrod*, 682 F.2d 688, 689 (7th Cir. 1982) (extension of statutes of limitation before a given prosecution is barred). Certainly, if Congress were to increase prosecutorial capacity to investigate crime, the law achieving that increase could be applied to crimes committed before its effective date without offending the ex post facto clause. That a criminal defendant might escape punishment altogether for reasons unrelated to his guilt or to the process of justice is not an expectation worthy of protection against retroactive impairment.

On the other hand, that people generally value the present more than the future cannot be ignored for ex post facto purposes. One need not be an economist to believe that a sentence which commences, for example, two years from now is less onerous than a sentence which commences today.[2] By amending former §3148 to help deter crime,

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[2] People's preference for the present over the future has been documented by several economists. Mancur Olson and Martin Bailey concluded in a 1981 study that the case for positive time preference is absolutely compelling. *Positive Time Preference*, 89 J. Pol. Econ. 1 (1981). *See also* Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Studies 289, 294-95 (1983):

> [P]eople discount the future . . . The threat of spending next year in jail is more serious than the threat of spending one year in jail ten years from now. For many people, the opportunities of the present seem more

Congress has implicity recognized that criminals consider the date on which a period of imprisonment commences to be part of the price paid for unlawful activity. While the Supreme Court has not always been clear on the underlying rationales for the ex post facto clause, certainly one rationale is that an individual who acts in reliance upon the known criminal penalties for his acts must be punished in accordance with that reliance. That rationale, by Congress's own determination, is fully implicated here.

More importantly, however, at least some of the reasons that defendants seek bail pending appeal are entitled to protection from retroactive impairment. A defendant sentenced to imprisonment who chooses to appeal his conviction has hope, however unjustified by the statistics, of reversing that conviction or even obtaining a judgment of acquittal. Under former §3148, those defendants within this class whose appeals were not shown to be frivolous also had an expectation that success on appeal would mean a release from punishment altogether. By restricting eligibility for release pending appeal, the new Act takes away that expectation.

This expectation — while not always reasonable — is of longstanding historical importance. As long ago as 1895,

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(Footnote 2 Continued)

important than those of the future, and even people who weight years of their lives equally will consider the possibility that the state will relent or they will die before the tenth year arrives. Prison disrupts the formation of human capital and also creates a stigma that may reduce future income substantially. Although it is not possible to know the size of this discount with certainty — for some people there are countervailing considerations, such as growth of income, that may make prison in the future especially onerous compared to prison now — it seems reasonable to assume that the discount and risk factors together are significant.

the Supreme Court noted that the statutes of the government "have been framed upon the theory that a person accused of a crime shall not, until he has been fully adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error." *Hudson v. Parker*, 156 U.S. 277, 285 (1895). *Accord, United States v. Motlow*, 10 F.2d 657, 662 (7th Cir. 1926). The right to bail pending appeal, while not itself constitutionally guaranteed, had nonetheless been deemed necessary in order to make the defendant's right to appeal fully effective and is therefore more than "merely procedural." *See Patterson v. United States*, 75 S.Ct. 256, 257 (1954) (Frankfurter, Circuit Justice) ("[T]he actual operation of the appellate procedure should not be allowed, through the denial of bail, to render the right to appeal nugatory.") Unlike rules regarding the competency of witnesses or the vesting of sentencing discretion in judge as opposed to jury, eligibility for release pending appeal is a right personal to the defendant the retroactive restriction of which can only work to his or her detriment.

While the Supreme Court has never addressed the issue directly, support for this conclusion can be gleaned from *Rooney v. North Dakota*, 196 U.S. 319 (1905). In *Rooney*, the Supreme Court held that extending the time before a death sentence can be executed is a mitigation in punishment. The language of the case is revealing:

> The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to [the prisoner's] advantage, for the court must assume that every rational person desires to live as long as he may. If the

> shortening of the time of confinement . . . before execution, would have increased, *as undoubtedly it would have increased*, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit.

196 U.S. at 235 (emphasis added). The court further noted that the extension of the time to live not only increased the prisoner's life, however, but also "increased the opportunity of the accused to obtain a pardon or commutation from the governor of the state before his execution." *Id.* at 235-36.

Rooney is distinguishable in that a defendant sentenced to death whose execution of sentence is postponed thereby gains longer life whereas defendants who postpone a period of incarceration merely exchange time today for time tomorrow. Even so, the court finds that most rational persons desire to put off punishment as long as they may. While countervailing considerations, such as family, income, or the desire to resume a normal life, may cause some criminals to choose punishment now, similar countervailing factors may cause a defendant sentenced to death to choose execution now and avoid prolonged anxiety. More importantly, however, the new Act does not affect defendants who wish to commence their sentences immediately upon conviction; only those who seek release pending appeal are disadvantaged.

The second rationale of *Rooney* — that enlargement of the time before execution increases the possibility of a commutation or pardon — is, of course, fully applicable to the present situation. The defendant who is on release pending appeal thereby increases the possibility that a Rule 35(b) motion for reduction of sentence might be

granted which would prevent his or her ever being sent to prison. As noted earlier, the possibility that this will happen is speculative, but certainly no more so than the possibility that a prisoner sentenced to death will obtain a governor's pardon. The language of *Rooney* — admittedly dictum — thus suggests an additional ground for finding that application of the Bail Reform Act of 1984 to the Cirrinciones offends ex post facto prohibitions.

In light of all these factors, the court concludes that the Bail Reform Act's standards for release pending appeal cannot be applied to offenses committed before October 12, 1984 without offending the ex post facto clause. The apparent purposes of the Act — to eliminate dilatory appeals and to help deter crime — are laudatory ones, but may not be used to enhance punishment of those who committed unlawful acts in possible reliance on previous standards. Since the Cirrinciones' crimes took place prior to October 12, 1984, their eligibility for release on appeal must be governed by former 18 U.S.C. §3148. As already explained, Tom Cirrincione meets those standards and his motion for release on bond pending appeal is therefore granted. Defendant Biagio Cirrincione's motion is taken under advisement pending the receipt of further information as to whether he is a flight risk.

Accordingly, defendant Tom Cirrincione's motion for release on bond pending appeal is granted. Defendant Biagio Cirrincione's motion for release on bond pending appeal is taken under advisement.

It is so ordered.

/s/

Susan Getzendanner
United States District Judge

January 16, 1985

(3) (2)

Nos. 84-1718 and 84-1760

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HUBERT T. CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

SALVADOR CANALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court applied the wrong standard in denying petitioners' applications for post-conviction bail pending appeal.

2. Whether application of the new statutory standard for bail pending appeal to petitioners, who committed the crimes for which they have been convicted prior to passage of the Act but who were sentenced after its enactment, violates the Ex Post Facto Clause of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1718

HUBERT T. CRABTREE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 84-1760

SALVADOR CANALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 84-1718 (84-1718 Pet. App. A1-A5) is reported at 754 F.2d 1200. The opinion of the court of appeals in No. 84-1760 (84-1760 Pet. App. 2-3) is not yet reported. The opinion of the district court in both cases (Pet. App. 7-11) is unreported.[1]

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 84-1760.

JURISDICTION

The order of the court of appeals denying bail pending appeal in No. 84-1718 was entered on February 22, 1985. The petition for a writ of certiorari was filed in that case on April 22, 1985. The order of the court of appeals denying bail pending appeal in No. 84-1760 was entered on February 4, 1985. A petition for rehearing was denied on March 28, 1985. The petition for a writ of certiorari was filed in that case on May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143,[2] states in pertinent part:

> (b) RELEASE OR DETENTION PENDING APPEAL BY THE DEFENDANT. — The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —
>
> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section 3142(b) or (c); and
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

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[2]The Act is Pub. L. No. 98-473, 98 Stat. 1979 *et seq.* Although its provisions are too new to appear in the current edition of the United States Code, we cite to the Code, as amended by the Act, for ease of reference. The revised 18 U.S.C. 3143(b) appears at 98 Stat. 1981.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisana, petitioners were convicted of racketeering, in violation of 18 U.S.C. 1962, based on criminal acts occurring between 1979 and 1981. Petitioner Crabtree was sentenced to concurrent three and one-half year terms of imprisonment on each of two counts and a total fine of $25,000. Petitioner Canale was sentenced to two and one-half years' imprisonment on one count and a fine of $15,000. On a second count he was fined an additional $15,000 and sentenced to five years' imprisonment, which was suspended in favor of three years' probation. The district court, applying the new standard governing bail pending appeal prescribed by the Comprehensive Crime Control Act of 1984, 18 U.S.C. 3143(b), denied petitioners' applications for release pending appeal. By separate orders the court of appeals sustained that ruling in each case.

1. Following petitioners' convictions, in an order dated January 2, 1985 (Pet. App. 4-5), the district court alerted counsel to the applicability in these cases of the provisions of the Comprehensive Crime Control Act of 1984 relating to release pending appeal. Thereafter, on January 23, 1985, petitioners each filed a motion for release on bond pending appeal. In his motion, petitioner Crabtree argued that he intended to raise five "serious issues" on appeal,[3] that the appeal was not frivolous or taken for delay, and that he was not likely to flee the jurisdiction pending appeal (84-1718 Pet. 4). Petitioner Canale asserted in his motion that application to him of the Bail Reform Act of 1984 constituted a violation of the Ex Post Facto Clause of the Constitution. If

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[3]They are: (1) the temporary presence on the jury panel of a juror allegedly tainted by knowledge of a co-defendant's prior conviction; (2) lack of evidence of two separate predicate acts; (3) error in the district court's ruling on "*James*" motions; (4) impropriety of government counsel's rebuttal argument; and (5) inadmissibility of tape recordings of petitioner's wife. See 84-1718 Pet. App. A7.

the Act were held applicable he argued that he should be released on bond pending appeal because (1) he was not likely to flee or pose any danger to the community, (2) the appeal was not for purposes of delay, and (3) he raised substantial issues likely to result in reversal.[4]

Following a hearing on January 23, 1985, the district court denied petitioners' motions for release on bond pending appeal on January 25, 1985 (Pet. App. 7-11), stating (*id.* at 8) that it had "no hesitation in concluding that the trial generated no substantial questions of law or fact which are likely to result in reversal on appeal" and that there were no "substantial questions of law or fact which will result in an order for a new trial." The district court held further that the application of the new bail standards to petitioners did not violate the Ex Post Facto Clause of the Constitution because the provisions of the Act were regulatory in nature and did not effect an enhancement of punishment (Pet. App. 10).

2. The court of appeals, acting through Chief Judge Clark sitting individually, denied Crabtree's application for release pending appeal on February 22, 1985 (84-1718 Pet. App. A1-A5).[5] Judge Clark found that Crabtree had "failed to carry the burden imposed on him [by 18 U.S.C. 3143(b)] to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3) and that the application

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[4]Canale indicated his intention to raise the following matters on appeal: (1) denial of his motion to dismiss indictment; (2) denial of a motion in limine; (3) prosecutorial misconduct; (4) prejudicial comments made by the court; and (5) denial of a motion to sever. See 84-1760 Pet. 18-25.

[5]Crabtree applied to Chief Judge Clark "as a judicial officer authorized to order release from detention pending appeal under 18 U.S.C. § 3141 to allow him to retain his bail status pending appeal of the district court's ruling on his application" and the court of appeals' "ruling on his appeal from his conviction and sentence" (84-1718 Pet. App. A2).

of the Act to him did not violate the Ex Post Facto Clause. Judge Clark found it unnecessary to reach the question whether Crabtree had established, as required by the amended 18 U.S.C. 3143(b), that his appeal was not taken for purposes of delay and raised substantial issues. Given his failure to present a transcript of the proceedings below, the court found that Crabtree had failed "to carry the burden imposed on him to show that his appeal is likely to result in reversal or a new trial order" (84-1718 Pet. App. A3). Judge Clark observed that "Crabtree acknowledges that the issue he raises as to improper argument of counsel must depend on an examination of the transcript," while the remaining issues raised in his brief are discussed in factual terms "without record support" (*ibid.*).[6] He noted that unlike the district court, which had denied Crabtree's application for bail pending appeal in the first instance and which was conversant with the contents of the record pertinent to Crabtree's claims, the court of appeals was in no position to undertake "any meaningful review or independent reconsideration" absent "a proper transcript or stipulated factual record" (84-1718 Pet. App. A4). Judge Clark made clear that his ruling was without prejudice to "what a subsequent judicial officer or panel of this court might rule" on any issue underlying a renewed request for relief supported by an appropriate record (*ibid.*).

Judge Clark did reach and reject Crabtree's claim that the application of the new standard for bail pending appeal to his case violated the Ex Post Facto Clause. The court determined that the changes in standards for bail pending appeal effected in 1984 were procedural in nature and did

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[6]Given that no transcripts accompanied the application, Judge Clark reasoned that "[r]egardless of whether this application should be considered as a review of the action of the district judge and, if so, whether the proper standard of review is abuse of discretion or the clearly erroneous test, or whether the application is addressed to me for independent action, I must refuse relief" (84-1718 Pet. App. A3).

not alter any substantial right, increase punishment, or change the ingredients of the offense or the facts necessary to establish guilt (84-1718 Pet. App. A4-A5).

3. Petitioner Canale filed a petition for writ of mandamus with the court of appeals, alternatively requesting bail pending appeal from the court of appeals or a stay of the district court's order. On February 4, 1985, a panel of the court of appeals denied the requested relief without opinion (Pet. App. 14). Thereafter, Canale applied for rehearing of the order of the court of appeals. On March 28, 1985, a panel of that court entered an opinion denying all relief requested by Canale (Pet. App. 2-3).

The court of appeals rejected Canale's assertion that the district court "misconstrued the new act's requirement that he demonstrate that his appeal 'raises a substantial question of fact or law likely to result in reversal or an order for a new trial' " (Pet. App. 2). Based upon a "careful[] review[]" of the remarks of the district court, the court of appeals rejected Canale's contention that the district court had erroneously "believed it could not permit him to remain at large without admitting that it had committed reversible error during his trial" (Pet. App. 3). Aligning itself "generally with the views of the Third and Ninth circuits" (citing *United States* v. *Miller*, 753 F.2d 19 (3d Cir. 1985), and *United States* v. *Handy*, 753 F.2d 1487 (9th Cir. 1985)), the court of appeals endorsed Canale's contention (also embraced by the government) that, in order to meet the requirement that an appeal raise "a substantial question," a defendant need not persuade the district court effectively to recognize that it had committed reversible error (Pet. App. 3). Rather, "the statutory reference is to a presence in the case of at least one fairly debatable or substantial issue of the type that calls in serious question the correctness of the judgment of conviction" (*ibid.*). Based upon its review of the district court's comments at the hearing of January 23, 1985, the court of appeals was persuaded that "this is the

standard which [the district court] applied," and "not some notion that the statute required a confession of error" (*ibid.*).

The court of appeals also rejected Canale's claim that the application of the Bail Reform Act violated the Ex Post Facto Clause (Pet. App. 2), citing the opinion in *Crabtree* as dispositive.

ARGUMENT

The petitions present two questions concerning the application of the new standards for bail pending appeal presented by the Comprehensive Crime Control Act of 1984. Neither has produced any material division of authority among the courts of appeals; indeed, the decisions below are supported by congruent decisions of many other circuits. Nor do the rulings below conflict with any decision of this Court. Further review is plainly unwarranted.

1. Petitioners argue that the application of the more stringent standard for bail pending appeal prescribed by the new Act "effectively increased the punishment for the criminal acts alleged to have been committed by applicant" (84-1760 Pet. 27; 84-1718 Pet. 15), and accordingly is violative of the Ex Post Facto Clause of the Constitution. The court of appeals rejected this claim in *Crabtree* (84-1718 Pet. App. A4-A5) and adhered to that view in *Canale* (Pet. App. 2).

All of the courts of appeals that have considered this question following enactment of the new bail standards have reached the same conclusion as the court below. Thus, in addition to the decisions of the court below, challenges to the applicability of the new bail Act under the Ex Post Facto Clause have to date been rejected in *United States* v. *Miller*, 753 F.2d 19, 21 (3d Cir. 1985), *United States* v. *Molt*, 758 F.2d 1198 (7th Cir. 1985), *United States* v. *Coulombe*, No. 84-2430 (8th Cir. May 1, 1985), slip op. 13,

United States v. *Affleck*, No. 85-1009 (10th Cir. May 24, 1985), slip op. 9-16, and *United States* v. *Ballone*, No. 85-3171 (11th Cir. May 24, 1985). For their challenge to this consensus view petitioners rely primarily upon district court rulings that have by now been rejected in their respective circuits. See 84-1760 Pet. 28; 84-1718 Pet. 17.[7] There is no reason for further review of the ex post facto issue. The uniform view of the courts of appeals is not inconsistent with any decision of this Court. And while the change in bail standards may work against the interest of defendants, this is not a sufficient indication that the statutory change is impermissibly retroactive under the Constitution. See *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Portley* v. *Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice). The change in the standard for bail pending appeal does not change the "quantum of punishment attached to the crime" (*Dobbert*, 432 U.S. at 294); it merely alters the likelihood that a defendant convicted of a crime will begin serving his assigned sentence (the length of which is not altered) at an early date.

2. Petitioners' remaining argument (84-1760 Pet. 10-15; 84-1718 Pet. 6-11) is that the standard applied by *the district court* to determine their eligibility for release pending appeal is inconsistent with decisions of the Third and Ninth Circuits. This contention also warrants no further review.

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[7] All but one of the district court rulings cited by petitioners have been overruled by subsequent holdings of their respective circuits. The sole exception is *United States* v. *Mitchell*, No. CR-83-0130 (N.D. Cal. Jan. 4, 1985). However, contrary to petitioner Canale's suggestion (84-1760 Pet. 28), *Mitchell* is plainly inapposite. The court there expressly held that its decision "does not reach the ex post facto issue or the constitutional challenges" to the Act (slip op. 2). Rather, the district court construed the *pre-trial* detention provisions of the Act to be inapplicable to defendants already admitted to bail prior to passage of the Act. Neither petitioner in this case is similarly situated.

All of the courts of appeals that have interpreted the standard for bail pending appeal prescribed by amended 18 U.S.C. 3143(b)(2) to date have agreed that the new statute mandates a two part test. They agree that under the new Act a defendant must show, first, that a substantial question has been raised on appeal from the judgment of conviction, and second, that if decided in the defendant's favor, the issue raised would result in reversal of the conviction or an order for a new trial on all counts on which the defendant was sentenced and not merely some more limited other relief or a finding that any error was harmless.[8] *United States* v. *Randell*, No. 85-1150 (2d Cir. May 3, 1985); *United States* v. *Miller, supra*; *United States* v. *Polin*, No. 85-5009 (4th Cir. Mar. 4, 1985) (opinion of Murnaghan, J., sitting individually); *United States* v. *Valera-Elizondo*, No. 84-2715 (5th Cir. May 14, 1985); *United States* v. *Coulombe, supra*; *United States* v. *Handy*, No. 85-3001 (9th Cir. May 21, 1985) (amended opinion); *United States* v. *Giancola*, 754 F.2d 898 (11th Cir. 1985). Finally, while some variations exist in the formulations used to flesh out the "substantial question" prong of the test, all of the courts of appeals are in agreement that Congress significantly elevated the threshold over the level that prevailed under prior law, and, at the same time, that Congress did not limit bail pending appeal to cases in which the district court was willing to certify its own error by finding that reversal on appeal was more likely than not to ensue. The Fifth Circuit's opinion in *Valera-Elizondo, supra*, like its opinion in *Canale* (Pet. App. 3), makes clear that it joins in this consensus.

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[8]These two criteria are in addition to the requirement of 18 U.S.C. 3143(b)(1) that the defendant establish that he does not present an undue flight risk, or a danger to particular persons or the community if released.

Against this background, the only issue the petitions frame is whether the court of appeals erred in concluding that the district court had not applied a standard that would have required it to confess its own error in order to grant bail pending appeal.[9] This fact-bound issue, which turns entirely on the court of appeals' assessment of the district court's remarks at the hearing preceding its written opinion, assuredly lacks any continuing general importance. We note, moreover, that as to petitioner Crabtree, the court of appeals never even had occasion to interpret the district court's ruling. Rather Crabtree's application was rejected because of his procedural default, which made it impossible for the court of appeals to assess any material aspect of his claim. See pages 4-5, *supra*. Because of that default, and because the court of appeals held out to Crabtree the opportunity to seek relief anew on a proper record, further review is especially inappropriate in his case.

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[9]Neither petitioner directly raises the underlying question whether he is in fact entitled to bail under the standards applied by the courts of appeals generally. Each does, however, canvass briefly the issues he anticipates raising on appeal (84-1718 Pet. 11-14; 84-1760 Pet. 18-25). As noted in the text that follows, the court of appeals had no occasion even to consider whether the appellate issues identified by petitioner Crabtree satisfied the statutory standard for substantiality. The court of appeals necessarily did reject that contention as raised by petitioner Canale, although his argument in the court of appeals, like that presented in this Court, focused almost entirely on the ex post facto issue and the standard applied by the district court to assess the substantiality of his appeal. See Pet. App. 2-3. As in this Court, Canale merely set forth his factual assertions without citing any authority suggesting that his claims have legal merit. In the circumstances, there is no occasion for this Court to review the court of appeals' determination that Canale had not demonstrated that his underlying appeal was sufficiently meritorious to warrant his admission to bail pending appeal.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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